No. 83-103

In the Supreme Court of the United States

October Term, 1983

WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 246,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

J. ROY WEATHERSBY
(Counsel of Record)
1100 C&S National Bank Bldg.
35 Broad Street, N.W.
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Of Counsel:

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1100 C&S National Bank Bldg.
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Petition For Certiorari Filed July 7, 1983
Certiorari Granted November 14, 1983

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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The following opinion, judgment and order have been omitted in printing this Joint Appendix because they

*The numbers in brackets refer to the page at which the testimony appeared in the trial transcript.

appear in the Appendix to the printed Petition for Certiorari:

RELEVANT DOCKET ENTRIES BEFORE THE NATIONAL LABOR RELATIONS BOARD AND THE UNITED STATES COURT OF APPEALS FOR THE 11TH CIRCUIT

Date	Documents
12–14–79	Charge filed in 10-CA-15293
1–29–80	Second Amended Charge in 10-CA-15293
2–4–80	Order Consolidating Cases, Complaint and Notice of Hearing
2–15–80	Georgia Kraft's Answer
7–14–80 7–18–80	Hearing
12–18–80	Administrative Law Judge's Decision
2–2–81	General Counsel's Exceptions
2–2–81	Georgia Kraft's Exceptions
2–12–81	Georgia Kraft's Answering Brief
9–30–81	Decision and Order of the National Labor Relations Board
10–21–81	Georgia Kraft's Petition for Review of the NLRB Order
11–25–81	General Counsel's Cross Application For Enforcement
1–25–82	Georgia Kraft's Brief
4–7–82	General Counsel's Brief
4–23–82	Georgia Kraft's Reply Brief
8–31–82	Oral Argument

Form NLRB-501
(2-07)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

FORM EXEMPT UNDER 44 U.S.C. 3512

CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 10-CA-13283

Date Filed 12-14-79

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer: Woodkraft Division/Georgia Kraft Company

b. Number of Workers Employed: Approx. 175

c. Address of Establishment (Street and number, city, State, and ZIP code): Rt. 3, Box 10, Greenville, Ga. 30222

d. Employer Representative to Contact: Plant Garnett McCullom, Mgr.

e. Phone No.: 404/ 627-4257

f. Type of Establishment (Factory, mine, wholesaler, etc.): Factory/Saw Mill

g. Identify Principal Product or Service: Lumber and Chip Products

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

(List subsections)

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

On or about and after December 9, 1979, the Employer discriminated against the below named employees in regard to their tenure of employment in an effort to discourage membership.

1. Landis Bishop
2. Scott Fowler
3. Ken Palmer
4. Jack Faulkner
5. Glene Brown
6. Charles Brown
7. James Kelly
8. Chuck Prather
9. Jerry Kirbo
10. Douglas Barlow
11. James Nixon
12. Jeff Hughes
13. John Ward
14. Mary Burth
15. Barry McCoy
16. Anthony Crouch
17. Eulice Favors
18. Cecil Barber
19. Carlene Frost
20. Yvonne Blalock
21. Jimmy O'Neal

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)

Laborers' Local Union No. 246

4a. Address (Street and number, city, State, and ZIP code): P. O. Box 2542, Columbus, Georgia 31902

4b. Telephone No.: 404/ 327-6424

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

Laborers' International Union of North America, AFL-CIO

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By: Charles E. Farmer
(Signature of representative or person making charge)

Business Manager, Laborers' Dist. Council of Georgia/South Carolina
(Title, if any)

1961 North Druid Hills Road, N. E., Suite 201A, Duncan Square, Atlanta, Ga. 30324
Address

404/325-0008
(Telephone number)

December 12, 1979
(Date)

WILLFULLY MAKING FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

SECOND AMENDED CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 10-CA-13793

Date Filed 1-29-80

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer: Woodcraft Division/Georgia Kraft Company

b. Number of Employees Employed: Approx. 175

c. Address of Establishment (Street and number, city, State, and ZIP code): Rt. 3, Box 10, Greenville, GA 30222

d. Employer Representative to contact (Name & Title): Garnett McCullom, Plt. Mgr. (404) 627-4231

e. Type of Establishment (Factory, mine, wholesaler, etc.): Factory/Saw Mill

f. Identify Principal Product or Service: Lumber and chip products

g. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a) subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

On or about and after December 9, 1979, the Employer discriminated against the below-named employees in regard to their tenure of employment in an effort to discourage membership.

1. Landis Bishop
2. Brett Fowler
3. Ron Palmer
4. Jack Faulkner
5. Charles Brown
6. James Kelly
7. Jerry Kirbo
8. Douglas Barlow
9. Jeff Rushes
10. John Ward
11. Harv Barth
12. Barry McCoy
13. Anthony Crouch
14. Dalice Favors
15. Cecil Barber
16. Carlene Frost
17. Yvonne Blalock
18. Jimmy O'Neal
19. Mike Williams
20. Crosby Favors
21. Terri Bowden
22. Robin O. Boudrie
23. Michael Buttram
24. Robert L. Buscell
25. Steven C. Smith
26. Donald Thrash
27. Wiley Shepard
28. Clarence Watson

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number): Laborers' Local Union No. 366

4a. Address (Street and number, city, State, and ZIP code): P. O. Box 2542, Columbus, Ga. 31902

4b. Telephone No.: (404) 327-6636

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (to be filled in when charge is filed by a labor organization): Laborers' International Union of North America, AFL-CIO

6. DECLARATION

By: [signature] Business Manager, Laborers' Dist. Council of Georgia/South Carolina

Charles A. Barnes
1961 North Druid Hills Road, N.E.
Suite 201-A, Duncan Square
Atlanta, Georgia 30329

(404) 325-0939

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001).

(February 4, 1980)

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 10

CASES 10-CA-15289
10-CA-15293

WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY

and

LABORERS' LOCAL UNION NO. 246

ORDER CONSOLIDATING CASES, COMPLAINT AND NOTICE OF HEARING

It having been charged in Cases 10-CA-15289 and 10-CA-15293, by Laborers' Local Union No. 246, herein called the Union, that Woodkraft Division/Georgia Kraft Company, herein called Respondent, has engaged in, and is engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, by the undersigned, having duly considered this matter and it being deemed necessary to consolidate said cases in order to effectuate the purposes of the Act and to avoid unnecessary costs and delay;

IT IS HEREBY ORDERED, pursuant to Section 102.33 of the Board's Rules and Regulations, Series 8, as amended, that these cases be, and they hereby are, consolidated.

Upon said charges, the General Counsel of the Board, on behalf of the Board, by the undersigned, issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended.

1.

A copy of the charge in Case 10-CA-15289, filed on December 12, 1979, was served upon Respondent by registered mail on December 14, 1979.

A copy of the charge in Case 10-CA-15293, filed on December 14, 1979, was served upon Respondent by registered mail on December 14, 1979. A copy of the amended charge in Case 10-CA-15293, filed on January 7, 1980, was served upon Respondent by registered mail on January 9, 1980. A copy of the second amended charge in Case 10-CA-15293, filed on January 29, 1980 was served upon Respondent by registered mail on January 31, 1980.

2.

Respondent is, and has been at all times material herein, a Delaware corporation, with an office and place of business located at Greenville, Georgia, where it is engaged in the operation of a lumber mill.

3.

Respondent, during the past calendar year, which period is representative of all times material herein, sold and shipped from its Greenville, Georgia facility finished products valued in excess of $50,000 directly to customers located outside the State of Georgia.

4.

Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

5.

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

6.

On November 15, 1979, employees of Respondent concertedly ceased work and engaged in a strike.

7.

On or about December 9, 1979, the strike described in paragraph 6 was terminated and the Union, on behalf of the striking employees, made unconditional application with Respondent to return to work.

8.

Respondent, on or about December 10, 1979, discharged and thereafter failed and refused to reinstate its following-named employees:

Landis Bishop	–	Scott Fowler
Ken Palmer	–	Jack Faulkner
Charles Brown	–	James Kelly
Jerry Kirbo	–	Douglas Barlow
Jeff Hughes	–	John Ward
Mary Burth	–	Barry McCoy
Anthony Crouch	–	Eulice Favors
Cecil Barber	–	Carlene Frost
Yvonne Blalock	–	Jimmy O'Neal
Mike Williams	–	Crosby Favors
Terri Bowden	–	Robin O. Boudrie
Michael Buttram	–	Robert L. Russell
Steven C. Smith	–	Donald Thrash

9.

Respondent, on or about December 20, 1979, discharged and thereafter failed and refused to reinstate its employees Wiley Shepard and Clarence Watson.

10.

Respondent discharged and thereafter failed and refused to reinstate its employees as alleged in paragraphs 8 and 9 above because of their membership in, and activities on behalf of, the Union, and because they engaged in concerted activities with other employees for the purposes of collective bargaining and other mutual aid and protection.

11.

All production and maintenance employees including plant clericals and team leaders employed by the Respondent at its Greenville, Georgia facility, but excluding all office clerical employees, salesmen, technical employees, professional employees, guards and supervisors as defined in the Act constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

12.

On September 22, 1977, in an election by secret ballot conducted under the supervision of the Regional Director for the Tenth Region of the Board, a majority of the employees in the unit described in paragraph 11 above, designated and selected the Union as their representative for the purpose of collective bargaining with Respondent with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

13.

On September 30, 1977, the Regional Director for the Tenth Region of the Board certified the Union as the exclusive collective bargaining representative of all the employees in the unit described in paragraph 11 above.

14.

At all times since September 30, 1977, the Union has been, and is, the representative of a majority of the employees in the unit described in paragraph 11 above for the purposes of collective bargaining and, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of all employees in said unit for the purposes of collective bargaining.

15.

A collective bargaining agreement between Respondent and the Union, and which embodied the rates of pay, wages, hours of employment and other terms and conditions of employment of the employees described in paragraph 11 above was effective from January 1, 1978, until October 31, 1979.

16.

On or about July 26, 1979, the Union timely notified Respondent that it desired to modify and renegotiate the terms and conditions of the collective bargaining agreement alleged in paragraph 15 above, effective upon its expiration.

17.

On or about September 9, 1979, Respondent and the Union commenced negotiations concerning terms and con-

ditions of a new collective bargaining agreement embodying the rates of pay, wages, hours of employment and other terms and conditions of employment of the employees described in paragraph 11 above.

18.

On or about December 9, 1979, Respondent and the Union agreed to the terms of a collective bargaining agreement, embodying the rates of pay, wages, hours of employment and other terms and conditions of employment of the employees in the unit described in paragraph 11 above.

19.

Respondent, on or about December 11, 1979, refused, and has continued to refuse, to execute the agreed upon collective bargaining agreement described in paragraph 18 above.

20.

The acts of Respondent alleged in paragraph 19 above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

21.

The acts of Respondent alleged in paragraphs 8, 9 and 10 above constitute unfair labor practices within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 14th of July, 1980, at 10:00 a.m., Eastern Daylight Time, and consecutive days thereafter until concluded, at the Federal Building and Post Office, Newnan, Georgia, a hearing will be con-

ducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Summary of Standard Procedures in Formal Hearings held before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the Regional Director acting in this matter as agent of the National Labor Relations Board, an original and 4 copies of an answer to said complaint within 10 days from the service thereof and that unless it does so all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its answer, Respondent shall serve a copy thereof on each of the other parties.

Dated at Atlanta, Georgia, this 4th day of February, 1980.

/s/ Curtis L. Mack
Curtis L. Mack, Regional Director
National Labor Relations Board
101 Marietta Tower, Suite 2400
101 Marietta Street, N.W.

(February 15, 1980)

UNITED STATES OF AMERICA BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 10

CASES 10-CA-15289
10-CA-15293

WOODKRAFT DIVISION/GEORGIA
KRAFT COMPANY

and

LABORERS' LOCAL UNION NO. 246

ANSWER TO COMPLAINT

Comes now Georgia Kraft Company - Woodkraft Division, Respondent in the above captioned matter, and through its undersigned attorneys files this its Answer to the Complaint.

FIRST DEFENSE

1. Respondent is without knowledge as to when the charge was filed as alleged in paragraph 1 of the Complaint but admits it received a copy of the charge as alleged.

2. Respondent admits the allegations contained in paragraphs 2, 3 and 4 of the Complaint.

3. Respondent denies the allegations of paragraph 5 of the Complaint.

4. Respondent admits that employees refused to work on November 15, but is without knowledge as to whether

or not they were engaged in a strike as alleged in paragraph 6 of the Complaint.

5. Respondent denies the allegations of paragraphs 7, 8, 9, and 10 of the Complaint.

6. Respondent admits the allegations of paragraphs 11, 12 and 13 of the Complaint.

7. Respondent is without knowledge as to the allegations and conclusions of law set forth in paragraph 14 of the Complaint.

8. Respondent admits the allegations set forth in paragraph 15 of the Complaint.

9. Respondent is without knowledge as to the allegations and conclusions of law set forth in paragraphs 16 and 17 of the Complaint.

10. Respondent denies the allegations in paragraphs 18, 19, 20 and 21 of the Complaint.

SECOND DEFENSE

All employees listed in paragraph 8 of the Complaint have been offered unconditional offers of reinstatement and all but three (3) are presently employed by Respondent. Because they engaged in misconduct during the period they were on strike, the time they were off from the date of their reinstatement to the date they may otherwise have been re-employed by Respondent is considered a disciplinary suspension.

THIRD DEFENSE

On December 10, 1979, Respondent received a telegram from the Laborers' International Union of North America, Local Union 246 stating that they accepted Re-

spondent's offers made at a meeting on December 3, 1979. One of the offers made at that meeting listed 19 of the employees named in paragraph 8 of the Complaint as strikers who had engaged in misconduct. Respondent submitted this list in writing and requested that they all be discharged because of their misconduct. Local Union 246's telegram accepted this proposal by Respondent and Respondent was entitled to rely upon their agreement in taking disciplinary action against those named individuals.

Respectfully submitted,

Powell, Goldstein, Frazer & Murphy
/s/ J. Roy Weathersby
J. Roy Weathersby
Attorneys for Respondent, Georgia Kraft Company

1100 C&S National Bank Building
35 Broad Street
Atlanta, Georgia 30303
(404) 572-6639

(December 18, 1980)

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
ATLANTA, GEORGIA

CASES 10-CA-15289
10-CA-15293
10-CA-15564

GEORGIA KRAFT COMPANY WOODCRAFT DIVISION[1]

and

LABORERS' LOCAL UNION NO. 246

Robert G. Levy, II, Esq.,
for the General Counsel.

J. Roy Weathersby, Esq., and
John N. Raudabaugh, Esq., (Powell,
Goldstein, Frazer & Murphy) for
the Company.

Mr. Charles R. Barnes, for the
Union.

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1. The formal papers in Cases 10-CA-15289 and 10-CA-15293 state the Company's names as "Woodcraft Division/Georgia Kraft Company", while the charge in Case 10-CA-15564 gives the name indicated above. Although the second complaint uses both names, the contract between the Company and the Union shows the above-captioned name to be correct (G.C. Exh. 2).

DECISION

Statement of the Case

HOWARD I. GROSSMAN, Administrative Law Judge: This case was tried in Newnan, Georgia, on July 14 through 18, 1980. The charge in Case 10-CA-15289 was filed on December 12, 1979, and the charge in Case 10-CA-15293 on December 14, 1979, by Laborers' Local Union No. 246 (herein the Union). An amended charge in Case 10-CA-15293 was filed by the Union on January 7, 1980, and a second amended charge on January 29, 1980. An order consolidating cases and complaint (herein the first complaint) were issued on February 4, 1980. The charge in Case 10-CA-15564 was filed by the Union on March 4, 1980, and a complaint (herein the second complaint) and an order consolidating cases were issued on April 18, 1980.

The complaints allege that Georgia Kraft Company/Woodcraft Division[2] (herein the Company) violated Section 8(a)(1) of the National Labor Relations Act (herein the Act) by (1) interrogating its employees concerning their Union sympathies and activities; (2) telling them that (a) they could not file grievances, (b) they could no longer have a Union steward present at disciplinary interviews because the Union no longer existed, (c) there was nothing they could do about written warnings because there was no union and no contract, (d) the Company would not sign a contract with the Union, and (e) the Company would bypass the Union in processing employee grievances; (3) denying an employee's request for Union representation during interviews which the employee had reasonable cause to believe would result in disciplinary action; (4) conducting such interviews notwithstanding its refusal to permit such representation; and (5) dis-

2. *Ibid.*

charging and thereafter failing to reinstate an employee as a result of such interviews.

The complaints also allege that the Company violated Section 8(a)(3) and (1) of the Act by discharging and thereafter failing to reinstate 28 named employees, and by refusing to pay accrued vacation pay to two of them, because said employees engaged in concerted activities for mutual aid and protection.

Finally, the complaint in Cases 10-CA-15289 and 10-CA-15293 alleges that the Company violated Section 8(a)(5) and (1) of the Act by refusing to execute a collective-bargaining agreement to which the parties had agreed.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs from the General Counsel and the Company, I make the following:

Findings of Fact

I. Jurisdiction

The Company is a Delaware corporation with an office and place of business at Greenville, Georgia, where it is engaged in the operation of a lumber mill. During calendar year 1979, which period is representative of all times material herein, the Company sold and shipped from its Greenville, Georgia, facility finished products valued in excess of $50,000 directly to customers located outside the State of Georgia. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Company admits, and I find, that the Union is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Alleged Violation of Section 8(a)(5)*

1. *The Bargaining History and Intervening Strike*

The Union was certified as the representative of the Company's production and maintenance employees on September 30, 1977, and the parties thereafter entered into a collective-bargaining agreement effective from January 1, 1978, until October 31, 1979. In July 1979, the Union timely notified the Company that it wished to modify and renegotiate the terms of the agreement.

The first negotiating session was held on September 11, 1979, the principal representatives being Charles R. Barnes for the Union and Broughton Kelly for the Company. The parties made proposals on a variety of subjects, but had not reached agreement by October 31, the end of the contract term. By agreement of the parties, the contract was extended to November 15, 1979, but the parties had still not reached agreement, and on that date the Union called a strike. According to Union Representative Barnes, the parties had reached "final positions" on a number of issues in meetings on November 6, 14, and 27, 1979.

The next meeting was held on November 29, 1979. The Union's representative was Howard Henson, Regional Manager for the Laborers' International Union. Although Henson was not called as a witness, the parties stipulated that he would have testified that he explained to Company representative Kelly that he was there to see whether "some movement could be made."

Henson and Kelly met again on December 3, 1979, and discussed seniority and the Company's desire to reorganize departments. Henson said that he would take the Company's proposal back to the Union committee.

Kelly also informed Henson, according to the latter's stipulated testimony, that he did not wish to deceive him, and handed him a list of strikers whom the Company intended to discharge. Henson replied that he would not discuss anything about firing strikers.

Kelly testified that he told Henson the employees had engaged in misconduct, warranting some kind of disciplinary action. According to Kelly, the Company had made no decision as of December 3, and would have considered some kind of discipline less than discharge.

On December 9, the Union sent a telegram to the Company reading as follows:

> "THIS IS TO ADVISE YOU THAT THE LAST COMPANY OFFER PRESENTED ON DECEMBER 3, 1979, HAS BEEN ACCEPTED AS A FINAL AND BINDING CONTRACT ALL EMPLOYEES WHO COULD BE CONTACTED WILL RETURN BACK TO WORK ON THEIR REGULARLY ASSIGNED SHIFTS EFFECTIVE DECEMBER 10, 1979 WE ARE PREPARED TO MEET AT YOUR CONVENIENCE TO SIGN THE AGREEMENT."

The strike ended the following day, December 10, and the strikers came back to the plant, but the Company did not allow all of them to return to work, as described hereinafter.

Kelly responded to the Union telegram by letter dated December 11, stating that several matters had to be resolved before there was agreement on a contract, and that this might be accomplished in one more meeting. The letter mentions the handling of strikers who had been replaced but who desired their jobs back, employees who allegedly had engaged in misconduct, and a pending "lawsuit" against the Company. Barnes also sent Kelly a letter

on the same date, asking for a meeting "to finalize the language and sign the Agreement."

The parties met again on December 19, with the intervention of a Federal mediator. Barnes returned as the principal Union representative instead of Henson, and Kelly continued for the Company. Kelly gave Barnes a proposed "Memorandum of Agreement" with 20 proposals, 2 of which are that the discharges of employees "who have been terminated" are to be "final and binding" upon the Union, and that the Union agree to withdraw "any proceeding or filing which it has initiated or plans to initiate with the National Labor Relations Board or courts against the Company or its employees."

Barnes stated that he had not engaged in any prior discussion with Kelly about discharging employees, although he acknowledged seeing a list of employees to be discharged which had been given to Henson (by Kelly on December 3). Barnes testified that he told Kelly that the employees were not guilty of the offenses with which they were charged.

Barnes was asked on cross-examination whether the Union's December 9 telegram, accepting the Company's December 3 offer, meant that the Union was accepting the Company's proposal to discharge employees. The Union representative replied that Kelly's statement to Henson on December 3 about discharging employees was not a "proposal", but, rather, was something the Company had already decided to do, and was not subject to bargaining. According to Barnes, the only "proposal" was the Company's position on departmental reorganization and progression of jobs, and it was this offer, plus all of the Company's previously stated positions, which the Union intended to accept by its December 9 telegram. Barnes stated that these positions had become fixed as of No-

vember 6, and had remained the same through the November 14 and 27 meetings.

The December 19 meeting concluded, according to Barnes, with Kelly saying that the Union would have to sign the Memorandum of Agreement, to which Barnes replied that he would not sign an agreement to discharge 20 employees. Kelly then received a telephone call, said that a decertification petition had been filed, and that the Company was not going to sign an agreement.

Kelly testified that the Memorandum of Agreement contained some subjects which were new, and others which had been covered previously. These were items "of concern" to Kelly, and he wanted "to get them straightened out." He obtained Barnes' agreement on some of the items but failed to reach an accord on others, including the provision for firing strikers.

The Company representative stated that he received a message during the meeting to the effect that a decertification petition had been filed, and that he informed the Union representatives of this fact. Kelly denied telling the Union that he would not sign an agreement under these circumstances. Instead, he informed the Union that he did not think the negotiations should continue with the decertification petition "hanging over our heads." (The petition was later dismissed.)

I credit Kelly's account of his reaction to the news of the decertification petition. However, I also credit Barnes' uncontradicted testimony that Kelly demanded that the Union agree to the terms in the Memorandum of Agreement, that Barnes refused to agree to the firing of strikers, and that the discussion of the decertification petition took place thereafter.

On February 22, 1980, Kelly wrote to Barnes that the Company had implemented its December 3 proposal on

Company reorganization of departments, but was experiencing morale problems because of employee opposition to changes in shifts. Accordingly, Kelly suggested a change in the Company proposal. Barnes answered by telegram dated February 29, 1980, that the parties had a valid contract, and that the Union objected to any unilateral change. Kelly responded by letter dated March 3, 1980, to the effect that there was no contract. He noted that the Union had not submitted any document which the Company could sign—and suggested as the reason the fact that there were unresolved issues between the parties.

By letter of March 12, 1980, Barnes repeated the Union's opposition to any "modification of the language of our Agreement," and stated that the Agreement was "completely typed" and ready for signature. Kelly answered two days later, on March 14, 1980, with a request for a copy of the "alleged" agreement, and a restatement of the Company's position. On March 31, 1980, he wrote that he had not yet received a copy, and asked that it be sent as soon as possible. Kelly's letter avers that the Union's "continued refusal to forward a copy of the contract is . . . bad faith bargaining."

Barnes replied to Kelly by letter dated April 9, 1980, and apologized for the delay in his response, which he attributed to an automobile accident and hospitalization. Barnes repeated that the contract was "totally prepared and typewritten" and ready for signature, and expressed opposition to the Company's charge of Union bad faith. Further, Barnes contended, because Kelly had referred to an "alleged" agreement, and because of the Company's basic position, there was "little need in wasting the postage sending (the Company) a copy of the Agreement."

In a telegram to the Union's business manager, Tommy L. Williams, on June 6, 1980, Company counsel Weathers-

by requested a meeting to "confer, negotiate, and discuss" the documents mentioned in Barnes' March 12, 1980 letter to Kelly. The telegram requests a copy of the agreement, suggests a meeting with a Federal mediator, mentions three dates the Company would be available, and advises that the Company representative would have authority to execute a contract if in agreement with its terms. Weathersby repeated this request in letters to Williams and Barnes on June 10, 1980.

On June 11, 1980, Barnes replied to Weathersby by telegram attributing delay to the Company, but specifying possible meeting dates in July 1980. Weathersby replied by letter on June 19, 1980, with an agreement to meet on July 3, 1980, one of Barnes' suggested dates. The letter cautions that the Company was not making a commitment to execute a contract it had never reviewed.

Barnes testified at the hearing that he became ill on July 2, 1980, and instructed his secretary to cancel the July 3 meeting. On the same day, July 2, Weathersby sent duplicate telegrams to Barnes and Williams protesting the cancellation. Henson sent a telegram to Weathersby the following day saying that cancellation was necessary because Barnes was the only Union representative who could represent the Company's employees, and Barnes sent a telegram on July 7 attributing the cancellation to illness. Barnes noted that he would be busy the next few weeks on matters including the hearing in the instant case, but promised to get in touch with the Company as to an alternate date. Barnes testified (on July 14, 1980) that he sent the Company a copy of the proposed contract on July 11, 1980, after advising them of his action by telegram the prior day.

2. *Analysis and Conclusions*

The General Counsel argues that, although there were differences between the parties through the December 3 meeting, the Union's December 9 telegram accepted the Company's offers on all unresolved issues and constituted acceptance of those offers, thus creating a contract. He also argues that the Company's demand that the Union withdraw charges against the Company, and agree to the discharge of certain strikers for alleged misconduct, constituted insistence upon nonmandatory subjects for bargaining and therefore was violative of Section 8(a)(5). The Company argues that there was no agreement because of numerous unresolved issues despite the Union's telegram, and that therefore there was no contract to execute.

It is clear that there never was any agreement between the parties. All parties concede that there was no agreement prior to the December 3, 1979 meeting between Union Representative Henson and Company Representative Broughton Kelly. At that meeting, Kelly requested Union agreement to Company discipline, possibly discharge, of strikers who had allegedly engaged in misconduct. Barnes' testimony, to the effect that this was not a Company "proposal," is not persuasive. Although the strikers' discharge notices stated that they had been terminated November 15, this had not been implemented. Kelly's testimony shows that he wished to bargain with the Union about discipline of the strikers, and that the Company may have reconsidered the matter and may have contemplated discipline less than discharge. If not, the Company sought Union agreement to the discharges. Henson's stipulated testimony that he would not discuss the firing of strikers suggests that Kelly wished to bargain about the matter and Henson did not. It is

obvious that the Company made a "proposal" at the December 3 negotiating session, involving Union agreement to discipline of strikers, and that the Union refused to discuss the matter.

Nor did the Union intend to accept this proposal in its December 9 telegram. Barnes testified explicitly that that communication was intended only to accept the Company's December 3 offer on departmental organization and progression of jobs, plus the Company's position on all other unresolved issues. Since the telegram was not intended to accept the Company's proposal to discipline strikers, there was no meeting of the minds. This fact makes it unnecessary to consider the myriad of other issues which the Company contends were unresolved.

Inasmuch as there never was any agreement, the Company did not violate Section 8(a)(5) by refusing to execute one. I note in passing that the Union did not deliver a copy of the alleged contract to the Company for signing until months after the supposed agreement.

It is also clear that the Company, by demanding on December 19 that the Union withdraw "any proceeding or filing which it has initiated or plans to initiate with the National Labor Relations Board or courts," was thereby insisting on the Union's agreement to a nonmandatory subject of bargaining.[3] At the time of this demand, the Union had already filed a charge and an amended charge, on December 12 and 14, 1979, and thereafter filed additional charges as described above.

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3. *N.L.R.B. v. Local 964, United Brotherhood of Carpenters and Joiners of America*, 447 F.2d 643, 78 LRRM 2167, 2168 (2d Cir., 1971), enfg. 181 NLRB 948 (1970); *International Union of Operating Engineers, Local Union No. 12, et al.*, 246 NLRB No. 81 (1979); *Peerless Food Products, Inc.*, 231 NLRB 530 (1977); *Kit Manufacturing Co., Inc.*, 142 NLRB 957, 971 (1963), enfd. as mod. 335 F.2d 166, 56 LRRM 2988 (9th Cir., 1964).

There is no evidence that the Company ever receded from this position, set forth on December 19, 1979, and the record shows that this was the last negotiating session. Although there were numerous communications thereafter, neither party changed position—the Union, that it had reached agreement with the Company; and the Company, that any agreement must contain the terms of the Memorandum of Understanding of December 19. I therefore find that the parties reached impasse on the terms of that Memorandum, including the Company's insistence on the Union's withdrawal of any "proceeding or filing." By such insistence, the Company violated Section 8(a)(5) and (1) of the Act.[4]

The General Counsel's contention that the Company similarly violated the Act by insisting that the Union agree to the Company's discharge of certain strikers, presents a more difficult issue. The first question, of course, is whether the discharges were "terms and conditions of employment" within the meaning of Section 8(d) of the Act. It would seem that the most elementary "condition" of employment is the question of whether employment exists in the first place, and that it therefore is a mandatory subject of bargaining. And thus it appeared in an early case where the Supreme Court held that an employer's contract with a company-dominated union forestalled collective bargaining on the discharged employees' rights to present grievances over their discharges to the employer, through their chosen labor organization.[5]

Many cases later, however, distinctions began to appear, and Mr. Justice Stewart stated in a concurring opin-

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4. *Ibid.*

5. *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 6 LRRM 674, 680 (1940).

ion in the *Fibreboard* decision:[6] "On one view of the matter, it can be argued that the question whether there is to be a job is not a condition of employment; the question is not one of imposing conditions on employment, but the more fundamental question whether there is to be employment at all."[7] His concurring opinion, however, cites various employer practices which have been held to be mandatorily bargainable, and he ultimately agrees with the Court's opinion placing subcontracting in that classification.

As noted previously, the employees' discharge notices were dated November 15, but had not been implemented prior to the December 3 and December 19 negotiating sessions, in which the demand for Union agreement to the discharges or other discipline first arose. However, the Company did not allow the strikers to work on December 10, which, I find hereinafter, constituted disciplinary suspensions on that date, followed by discharge on December 20.

The Board has concluded that an employer's demand for nonreinstatement of illegally discharged employees is a nonmandatory subject of bargaining.[8] The question presented by the instant case is whether the legality or illegality of the discharges determines the legality or illegality of the Company's demand, under Section 8(a)(5), for Union waiver of the employees' employment rights.

In a recent case[9] the Board appears to have answered this question in the affirmative. In that case the union

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6. *Fibreboard Paper Products Co. v. N.L.R.B.*, 379 U.S. 203, 57 LRRM 2609 (1964).

7. *Ibid.*, 57 LRRM at 2616-2617.

8. *Nordstrom, Inc.*, 229 NLRB 601, fn. 3, 609-610 (1977).

9. *Olin Corporation*, 248 NLRB 1137 (1980).

demanded reinstatement of an employee who had been discharged for reasons which were unknown, as a condition of the union's reaching agreement with the employer. Noting that there was no contention that the discharge constituted an unfair labor practice by the employer, the Board stated: "An employer is entitled to discharge an employee for any reason so long as the motive is not discriminatory within the meaning of the Act. Thus we conclude that the Union's injection of (the employee's) termination into the ongoing bargaining was, in the circumstances, an attempt to frustrate the bargaining process, and we find it to be in violation of Section 8(b)(3)."[10]

This seems to mean that if the discharge *had been* discriminatorily motivated, the union would have been justified in conditioning agreement with the employer on reinstatement of the employee. A necessary corollary of this position is that an employer similarly does not violate Section 8(a)(5) if he conditions agreement with a union on nonreinstatement of a discharged employee, so long as the discharge was not unlawful. Principles of equity in assessing the relative bargaining obligations of employer and labor organization require this conclusion. As the Board stated, "An employer is entitled to discharge an employee for any reason so long as the motive is not discriminatory. . . ."[11] The result in *Nordstrom*[12] is not inconsistent with this rationale, because in that case the employees covered by the employer's nonreinstatement demand were unlawfully discharged, and, accordingly, the nonreinstatement demand was also found to be unlawful.

I conclude that disposition of this argument by the General Counsel awaits determination of the Section 8(a)(3) issues.

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10. *Ibid.*, 248 NLRB at 1141.
11. *Ibid.*
12. *Supra*, fn. 8.

B. *The Alleged Independent Violations of Section 8(a)(1)*

1. *Alleged Refusal of Supervisor Rutledge to Permit Union Stewards at Disciplinary Interviews*

The second complaint (paragraph 9) alleges that Company Supervisor Everett Hugh Rutledge,[13] on about February 15, 1980, told employees that they could no longer have Union stewards at disciplinary interviews because the Union no longer existed. The only evidence in support of this allegation is the testimony of employee Alex Favors, Jr., who stated merely that Rutledge "came in with the reprimand" and said that Superintendent Jack Harbin wanted Rutledge "to write me up." Favors testified on direct examination that he asked for a Union steward, that Rutledge replied that there was "no union," and that Favors refused "to sign the reprimand." On cross-examination, Favors stated that Rutledge came in with the reprimand "in his hand." Favors first repeated his earlier testimony that he refused "to sign the reprimand," but, on additional cross-examination, said that he "didn't refuse to sign it."

Rutledge testified that Favors was late on about February 1, 1980, and that he then counseled Favors to try his best to be on time. On the morning of February 15, Rutledge saw Favors in the shop, and the latter said, "I'm late again." Rutledge said nothing, checked Favors' time card and got a reprimand form. He returned to Favors and said, "This is the second time in a two week period. I'm going to have to write you a reprimand." According to Rutledge, Favors replied, "I know I'm in the wrong." Rutledge avers that he then asked Favors whether he wanted "a witness or anyone," and Favors replied that it was not necessary. Favors then signed the reprimand.

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13. The pleadings establish and I find that Rutledge is an agent of the Company and a supervisor within the meaning of Section 2(11) of the Act.

Barbara Lawler, the Company's Manager of Industrial Relations, testified that it was Company practice after the strike, in a disciplinary interview, to afford the employee a representative of his own choosing if he requested one. This was the same policy as the one in effect before the strike. Lawler further averred that there was a meeting of supervisors in December (1979) in which this policy was explained.

Analysis of the Evidence

Rutledge was the more credible witness, and provided a more detailed version of these events. His testimony is supported by that of Lawler. It is clear that Favors had been late a second time, and that Rutledge's determination of this was based on Favors' voluntary statement—to which Rutledge said nothing—and on Rutledge's investigation of Favors' time card. It is also clear that the decision to issue a reprimand was made prior to Rutledge's second conversation with Favors on February 15. Both Rutledge and Favors agree that the supervisor already had the reprimand form in hand when he approached Favors, and that he simply announced that he was going to issue the reprimand. Favors' testimony suggests that the Company decision to issue the reprimand was based on prior instructions to Rutledge from Harbin.

There is a direct conflict in the evidence on the issue of whether Favors asked for Union representation. As already described, Favors changed his testimony on cross-examination and admitted that he did sign the reprimand. Although he may have done so even after demanding a Union representative, this is less plausible than Rutledge's consistent account that Favors volunteered he was again late, admitted that he was wrong, and waived his right to a "witness" when Rutledge offered it. I credit Lawler's

uncontradicted testimony that it was Company policy to grant an employee's request for Union assistance in disciplinary interviews, and that this policy was explained to supervisors in December 1979. It is unlikely that Rutledge would have acted contrary to Company policy, and I credit his testimony on this issue. Further, since Rutledge's alleged "no union" comment was a response to Favors' claimed demand for a steward—which I do not credit—I do not accept Favors' testimony on the "no union" question.

The law on an employee's right to Union representation at a disciplinary interview has undergone recent evolution since the Supreme Court's announcement of that right in the *Weingarten* case.[14] The Board thereafter concluded that "as long as the employer has reached a final, binding decision to impose discipline on the employee prior to the interview, based on facts and evidence obtained prior to the interview, no Section 7 right to union representation exists under *Weingarten* when the employer meets with the employee simply to inform him of, or impose, that previously determined discipline."[15] This view has also been announced by the Court of Appeals for the Fifth Circuit.[16]

I conclude that this principle is applicable to the reprimand imposed on Favors by Supervisor Rutledge. Although Rutledge obtained his first hint that Favors had been late a second time from the employee himself, there is not a shred of evidence that Favors' disclosure was the result of any Company questioning. Favors simply blurted

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14. *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

15. *Baton Rouge Water Works Company*, 246 NLRB No. 161, sl. op. p. 8 (1979); see also *Great Western Coca Cola Bottling Co.*, 251 NLRB No. 122 (1980); *Airco Alloys*, 249 NLRB No. 81 (1980); *K-Mart Corporation*, 242 NLRB No. 140 (1979).

16. *Anchortank, Inc. v. N.L.R.B.*, 618 F.2d 1153, 104 LRRM 2689 (5th Cir., 1980), enf. as mod. 239 NLRB No. 52 (1978).

it out, and Rutledge, without asking any questions, independently determined the truth of the matter by consulting Favors' time card. It is probable that Rutledge reported these matters to Superintendent Harbin, and that the latter made the decision to reprimand Favors on the facts then known. Rutledge's second conversation with Favors on February 15 was therefore solely for the purpose of imposing the discipline upon the latter, and did not constitute a transgression of *Weingarten* rights.

It is true that the Board has announced a strict construction of this rule. "Thus, for example, were the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, or to attempt to have the employee admit his alleged wrongdoing or to sign a statement to that effect, or to sign statements relating to such matters as workmen's compensation, such conduct would remove the meeting from the narrow holding of the instant case, and the employee's right to union representation would attach."[17]

The only one of the foregoing exceptions with any remote application to Favors' reprimand is his action in signing it, apparently at Rutledge's request, after the discipline was imposed. In one sense this may be construed as Rutledge's obtaining a signed "admission" from Favors that he was guilty of the charged offense. On the other hand, it may simply have been the Company's method of obtaining a receipt from Favors acknowledging imposition of the discipline. The written reprimand itself is not in evidence, and the testimonial record is insufficient to warrant an inference that the Company sought or obtained an "admission" in the form of a signed reprimand. If it wanted documentary proof of the infraction, Favors'

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17. *Baton Rouge Water Works Company, supra,* fn. 15.

time card was already available. In any event, Favors waived his right to Union representation, on the credited evidence, and with such waiver rendered the *Weingarten* doctrine inapplicable.

For these reasons, I conclude that this allegation of the complaint should be dismissed.

2. *Allegation that Maintenance Foreman O'Neal Told Employees There Was Nothing They Could Do About Written Warnings Because There Was No Union and No Contract*

The second complaint (paragraph 10) alleges that Maintenance Foreman Alvin Bruce O'Neal[18] threatened employees on March 14, 1980, that it would be futile for them to engage in Union activities by telling them there was nothing they could do about written warnings because there was no union and no contract. Walter A. Colwell, a striker, testified that he had a conversation with O'Neal after he returned to work. Although Colwell could not remember the exact date, he said that it was about the middle of February 1980 in the "break room." According to his testimony, Colwell told O'Neal that he had been "written up" twice (for overturning a "Caterpillar" and for knocking down an air conditioner), but that only one of the reprimands was warranted. Colwell averred that O'Neal replied that there was nothing he could do because "we don't have a union and we don't have a contract right" (sic). Colwell testified that O'Neal was a friend of his.

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18. The pleadings establish and I find that O'Neal is an agent of the Company and a supervisor within the meaning of Section 2(11) of the Act.

O'Neal testified that Colwell works in "Green End," one of the Company's departments.[19] He acknowledged that he knew Colwell and talked with him regularly, occasionally in the "break room." However, he denied that Colwell ever told him that the latter had been treated unfairly, or that he, himself, said there was no Union contract or no grievance procedure. He testified that he attended several meetings with McCollum after the return of the strikers, and that he was instructed not to harass anybody and to stay within the rules and guidelines of the Company. If anything out of the ordinary came up, he was to inform his superiors.

Analysis of the Evidence

It is odd that Colwell did not complain about his alleged grievance to his own supervisor, Williams. O'Neal was the more believable witness, and I credit his testimony. Accordingly, this allegation should be dismissed.

3. *Alleged Statements by Plant Manager McCollum that the Company Would Not Sign a Contract with the Union and Would Bypass the Union in Processing Grievances*

The second complaint (paragraphs 11 and 12) alleges that Company Plant Manager Garnett McCollum[20] threatened employees on February 15 and 29, 1980, that the Company would bypass the Union in processing grievances, and, on March 4, 1980, that it would not sign a contract with the Union.

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19. Another witness, Virgil Williams, testified that he is the supervisor of Green End.

20. The pleadings establish and I find that McCollum is an agent of the Company and a supervisor within the meaning of the Act.

Carlene Frost, a striker, testified that she returned to work February 8, 1980, and attended a Company meeting on February 11 or 12. McCollum said that the Company had let them come back to work out of the goodness of its heart. The Company hoped that they would come back without hard feelings, because it wanted them back and did not want any animosity. McCollum was asked about vacations, and replied that he would check into it. He was asked about grievances and reprimands, and replied that "we have no union, no arbitration procedure. Any kind of reprimand that you receive, you bring it to us and we'll handle it."

Mary Burth, another striker who returned at about the same time, testified to a Company meeting on about February 16, 1980. McCollum said that the Company had taken back the strikers "out of good faith." There was no ill feeling between the people that he had taken back (sic). "We still had a union but no grievance proceeding and no steward." Striker Wiley Shepherd remembered a speech in which McCollum said there was "no union."

McCollum testified that he had regular meetings with employees to discuss Company problems. He held two special meetings in February 1980 with employees who had been "terminated" and then offered "reemployment." The purpose of these meetings was to acquaint the employees with some changes in mill operation, and to assure them that they could return with "no strings attached" and no "retribution." McCollum denied saying that they were brought back "out of the goodness of (the Company's) heart." On the subject of grievance procedure, he told the employees that the Company did not have a signed contract or a formal grievance procedure, but that if they had a grievance to bring it to the Company, and McCollum

would "find out the proper channels and how to handle it." McCollum denied saying that there was no longer a union or union stewards at the plant or that the Company would not sign a contract with the Union.

Company Manager of Industrial Relations Barbara Lawler testified that she was present during January 1980 meetings with employees during which she and McCollum spoke to returning strikers.[21] McCollum discussed business conditions, and Lawler discussed a variety of subjects—employee benefits, how to file medical claims, safety, training, etc. Lawler denied that she ever said there was "no union." The Company position, which she stated to the employees, was that there was no contract, but that there was a union. Lawler denied saying that there was no grievance procedure—the issue simply did not come to her attention, according to her testimony.

Analysis of the Evidence

There is no evidence in support of the complaint allegation that McCollum said that the Company would not sign a contract with the Union. The evidence pertaining to the January 1980 meetings suggests that they were routine in nature, nor does the General Counsel allege anything illegal about them. This aspect of the case thus comes down to the conflicting evidence of the February meetings. Although Frost testified that McCollum said there was "no union," she is contradicted not only by McCollum but also by another striker, Burth. Lawler said that she told employees in the January meetings that the Company's position was that there was a union, but no contract—a simple statement of the true facts. I credit McCollum and Burth, and find that McCollum did not say there was "no union."

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meetings with employees.

21. Lawler was not present during McCollum's February 1980

I also conclude that McCollum did not, as alleged in the complaint, solicit grievances with a promise, express or implied, to bypass the Union in solving the grievances. I credit his testimony that he replied that any employee with a grievance should bring it to the Company, and McCollum would "find out the proper channels and how to handle it." This is not a promise that the Company would remedy the grievance itself, or would bypass the Union. Rather, it constitutes an admission by McCollum that he did not know what to do, but would find out if a grievance were presented to him. The Board has concluded that similar statements, not involving express or implied promises to remedy a grievance, were not violative of the Act,[22] and the same principle is applicable herein.

However, according to McCollum's own testimony, he also told the employees that they did not have a formal grievance procedure. The Company's obligation to its employees extended beyond the complaint theory that it refrain from bypassing the Union in grievance procedure—it was also obligated to refrain from making any unilateral changes in matters which are mandatory subjects of bargaining following expiration of the contract,[23] and was required to process grievances in accordance with the provisions of the expired contract, absent an impasse on that subject.[24]

McCollum was technically accurate in telling the employees that there was no signed agreement, since it had ex-

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22. *Villa Care, Inc.*, 249 NLRB No. 95 (1980); *Marcus Hardware, Inc.*, 243 NLRB No. 158 (1979); *Engineered Apparel, Inc.*, 243 NLRB No. 11 (1979).

23. *Dial Tuxedos, Inc.*, 250 NLRB No. 64 (1980); *Hinson v. N.L.R.B.*, 428 F.2d 133, 73 LRRM 2667, 74 LRRM 2194 (8th Cir., 1970), enfg. 175 NLRB 596 (1969).

24. *Turbodyne Corp., Gas Turbine Div.*, 226 NLRB 522 (1976); *Times Herald Printing Co.*, 221 NLRB 225 (1975).

pired. He was inaccurate, however, when he said that there was no formal grievance procedure. That procedure survived the expiration of the contract, and the employees had all the rights thereunder which they had during the life of the agreement. When McCollum told employees that there was no formal grievance procedure, he demeaned their then existing rights under the Act. I conclude that in so doing he interfered with those rights in violation of Section 8(a)(1).

4. *The Interviews With, and Subsequent Discharge of, Willie Bryant:*

The second complaint alleges that Green End Supervisor Virgil Williams[25] denied Willie Bryant's request for Union representation during two disciplinary interviews on February 29, 1980, conducted such interviews nonetheless, and thereafter, on about March 3, 1980, discharged Bryant in violation of Section 8(a)(1) of the Act (paragraphs 13-15, 17).[26] Bryant was an operator of a "timber jack," a large machine which hauls logs, and Williams was supervisor.

Bryant went on strike and returned to work thereafter. On direct examination, Bryant testified initially that he had a conversation with Williams in the latter's office, that the supervisor said he would "drive him to Greenville . . . to get a package." Thereafter, Williams took him to the "jail house" and said the "package" was inside. Instead, Williams requested the sheriff to give an "alcohol

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25. The pleadings establish and I find that Williams is an agent of the Company and a supervisor within the meaning of Section 2(11) of the Act.

26. The second complaint fails to allege the claimed denial of Union representation (paragraph 15) as a violation of Section 8(a)(1) (paragraph 20).

test" to Bryant. Asked on direct examination to repeat this description of these events, Bryant said essentially the same thing, stated that he was given a "breath test," and thereafter was taken by Williams to the office of (Industrial Relations Manager) Barbara Lawler. Williams showed Lawler the results of the test, and Lawler asked Bryant whether he had been drinking. Bryant said "no," although he conceded that he had been drinking the night before, after work. Lawler told him to go home and return on Monday at 2 o'clock. Asked whether there was any further conversation between him and the two Company representatives, Bryant answered in the negative.

Bryant returned Monday and saw Green End Superintendent Jack Harbin, who told him that "they were going to kick (his) damn ass in." Bryant said nothing. Williams came in, took him to another office, and told him he was "terminated." Williams tried to get him to sign something, and Bryant refused. Williams then got Lawler, who also tried to get Bryant to sign something, and he again refused.

After this testimony, Bryant's attention was directed to his initial conversation with Williams, and he was asked whether he had anything to say about the Union. After the Company's objection to the question and an extended colloquy, the witness stated that the "truth" was coming to him. He asked Virgil Williams three times for a "witness", by which he meant a steward, and also asked for one the following Monday during the discharge interview. He did not ask anyone other than Williams for a steward.

On cross-examination, Bryant testified that his actual breath test was lower than the score recorded, "one point," but that Williams asked the policeman to make it "15," or "one point five," and the latter did so. There is no such

statement in Bryant's pre-trial affidavit.[27] Bryant cannot read or write, and the affidavit is signed with his mark. He testified that he told the individual who prepared the affidavit about Williams' telling the police officer what to write down on the report. Bryant denied that he had anything to drink on the day he was examined, or that the police officer said that the test results showed he was highly intoxicated, or that he admitted this to Lawler.

Bryant asserted on cross-examination that both Williams and Lawler told him that he could not have a "witness," and that he asked for one in the first conversation with Williams on February 29, in his subsequent conversation with Lawler on the same day, and in his discharge conversation with Williams on the following Monday. There is no record of the last request in his affidavit.

Williams testified that Bryant had "punched in" on Friday and was "wobbling when he was walking." He told Bryant that he thought he had been drinking, and asked him into the office. Williams then smelled liquor on Bryant's breath. Williams asserts that he asked Bryant whether he wanted a witness, from the Union or otherwise, and the latter replied, "What would it matter?" Williams then asked another supervisor to come in as a witness.

Williams told Bryant that he was under suspicion of drinking, that it would be to Bryant's advantage to have a test, and that the latter agreed to do so. Williams denied telling Bryant that he wanted him to accompany the former "to pick up a package." Williams took Bryant to the sheriff's office where Bryant's breath was analyzed.

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27. After the Company used the affidavit in an attempt to impeach Bryant, it was admitted into evidence on the General Counsel's motion, over the Company's opposition.

The test result was ".15", which, according to the officer's statement to Williams, normally meant that the individual was "drunk."

Joseph C. Branch, Deputy Sheriff of Meriweather County, Georgia, testified that he has received special training in the administration of "Breathalyzer" or "Intoximeter" tests, and has administered hundreds of such tests. Williams brought Bryant in on February 29, 1980, and requested a test. Branch told Bryant that he did not have to take the test and that there was nothing Branch could do if Bryant refused. Bryant then said he would take the test. The result, according to Branch, was ".15 grams percent." The report of the test is in evidence. Further, according to Branch, under Georgia law a driver with a test result of .10 grams percent can be charged with "driving under the influence." Branch denied that Williams asked him to alter the test result.

Williams testified that he took Bryant to Lawler's office after the test, that the latter again asked Bryant whether he wanted a representative, and that Bryant refused. Lawler could not recall whether she asked Bryant whether he wanted a Union representative, but was positive that Bryant himself did not ask for one.

Williams gave Lawler the copy of the Breathalyzer test, and the latter asked Bryant what he had been drinking. According to Lawler, Bryant replied that he had "about half-a-pint of Seagram's about noon time." Lawler informed Bryant that he was suspended, and instructed him to return the following Monday, March 3, 1980. Lawler then called the sheriff's office and received information about the test results substantially the same as those stated by Deputy Sheriff Branch.

Bryant arrived early on March 3, according to Lawler. She told him that Williams would be talking with him,

and asked him whether he wanted a representative. Williams then took Bryant into a conference room for the purpose of terminating him. Williams testified that Bryant did not ask for a Union representative. Williams discharged him, and Bryant refused to sign the "release papers." Williams then came to Lawler's office and said that Bryant wanted to talk to her. She went to the conference room, where Bryant, who was "upset," said that he was "going to get the Union on this."

Analysis of the Evidence

I credit Deputy Sheriff Branch's impartial testimony and the documentary evidence of his testing of Bryant. Based on the scientific evidence, I conclude that Bryant was intoxicated on February 29, 1980. The Company argues, from this fact, that Bryant is the least reliable witness of the events of that day. There is merit in this argument.

Other aspects of Bryant's testimony cast doubt on his accuracy and truthfulness. Thus, the Breathalyzer test result, plus Lawler's testimony that Bryant admitted drinking half-a-pint of whiskey at noon that day, impugn Bryant's testimony that he had not been drinking. Bryant's statement that Sheriff Branch altered the test results at Williams' request is unsupportable, since Branch, an unquestionably credible witness, denied this accusation. Bryant's testimony about the "package" that Williams supposedly wanted to get is improbable, and I credit Williams' denial.

On the crucial issue of whether Bryant requested Union representation,[28] the fact that he repeatedly failed

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28. It is clear that the Company had already decided on the discipline to be imposed prior to the interview with Bryant on March 3. Accordingly, the only relevant issue is the alleged denial of Union representation on February 29, 1980. See authority cited in fn. 15, *supra*.

to mention this on direct examination, until asked a leading question, casts doubt on his later testimony. This doubt broadens into disbelief when Bryant's testimony is compared with the clear and explicit testimony to the contrary from Lawler and Williams. Although Bryant's pre-trial affidavit tends to support his corrected testimony, there are discrepancies between the affidavit and the testimony. I credit Lawler and Williams and conclude that Bryant did not in fact ask for Union representation at any time, that he was in fact offered same at the times specified in the Company representatives' testimony, and that he declined. The fact that he demanded Union participation *after* the interviews and after he had already been discharged, as stated by Lawler, is irrelevant to the issue of whether he was denied his rights under *Weingarten*.[29] It is also clear that Bryant's participation in the Breathalyzer test was entirely voluntary on his part.

I have carefully considered the fact that Bryant is illiterate. Although he sometimes has difficulty in expressing himself clearly, he is sufficiently alert to know his rights.

Whether Bryant was not sufficiently alert to comprehend these rights on February 29, 1980, *because of* his intoxication, raises a different issue. Is an employer precluded from investigating suspected employee intoxication because the employee does not understand his *Weingarten* rights? If this were law, an employee could repeatedly drink himself into a stupor on the job, or accomplish the same result with narcotics, and then protest his subsequent discharge on the ground that he did not understand his rights when the employer investigated the matter—in effect protecting himself with his own transgression.

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29. *N.L.R.B. v. J. Weingarten, Inc., supra*, fn. 14.

In the careful balancing of employer and employee rights which is mandated by the Act, a license of this nature would preclude an employer from requiring sobriety among his employees. This is unreasonable, and I do not believe that *Weingarten* extends this far.

For the foregoing reasons, the allegations pertaining to Willie Bryant should be dismissed.

5. *Remaining Independent Section 8(a)(1) Allegations*

There being no evidence in support of the remaining Section 8(a)(1) allegations, they should be dismissed.

C. *Alleged Violations of Section 8(a)(3)*

1. *Introduction*

As described above, the strike began on November 15, 1979. The comparative numbers of strikers, nonstrikers, and alleged discriminatees are not clear from the record. In a complaint filed in a Georgia state court, described hereinafter, the Company stated that there were 200 employees in the plant. Plant Manager McCollum testified that he saw 140 pickets on the first day of the strike, while Industrial Relations Manager Barbara Lawler mentioned 60 as the most that she saw. Inasmuch as there are 28 employees alleged to have been discriminatorily discharged (in the first complaint), it is reasonable to infer, and I find, that there were at least twice as many strikers as alleged discriminatees.

After the Union's telegram of December 9, 1979, advising the Company that the Union was accepting the "last Company offer" (of December 3), and that employees would return to work on December 10, numbers of strikers reported for work. Some of these were put back to work

immediately, although not necessarily on the same shift which they occupied before the strike. The first shift had been filled by permanent replacements, except for one job, and returning strikers were hired on the second shift on the basis of seniority and first in time to report to work. There was no third shift in December 1979.

Of the strikers who attempted to return, 28 (named in the first complaint) were not put back to work at that time. Separation notices of 25 strikers dated November 15 stated that they had been terminated for various alleged acts of misconduct. According to Industrial Relations Manager Lawler, however, the separations were not effectuated until December 20, the day after the last bargaining session. It is clear nonetheless that the alleged discriminatees were not returned to work on December 10.

After the issuance of the first complaint (February 4, 1980), the Company offered all alleged discriminatees "positions of employment and reinstatement." It began a third shift, and the returning alleged discriminatees were returned to work on that shift, since the first and second shifts were filled. These employees gained no time for seniority and vacations until they reported for work in February 1980. Industrial Relations Manager Lawler credibly testified that third shift employees receive 15¢ more per hour than employees on other shifts doing the same work, that first and second shift vacancies existed after February 1980, and that there were third shift employees who did not bid for these vacancies although they were permitted to do so under plant rules.

The first complaint alleges that all 28 of the employees named therein were discriminatorily discharged because of their Union activities, and the second complaint alleges

that 2 of these employees were also denied accrued vacation leave for the same reason.

The General Counsel's position at hearing was that the fact that the 28 discharged employees were strikers establishes a *prima facie* case of discriminatory motivation. In his brief the General Counsel appears to argue that the delay in time between the decision to fire certain strikers and the actual implementation of the discharges further establishes unlawful motive. The General Counsel further argues that the return of the 28 strikers to employment with the Company in February 1980 does not constitute "reinstatement."

The Company responds that the General Counsel has not established a *prima facie* case of discrimination, and points to the fact that it did take back some strikers on the day the strike ended. The Company acknowledges that, in past cases of discharge after extended absence, the notification of discharge was sent by mail, but contends herein that there was an inevitable delay because of the disruption of the strike, the strikers' unavailability during the strike, and the fact that Company policy on discharges required consultation among various supervisors before a decision could be made.

Of the 28 strikers that it did not take back until February 1980, the Company contends that 25 were discharged because of strike misconduct. Two were discharged because they refused different jobs at lesser pay which the Company offered them in lieu of their former jobs, which had been filled by permanent replacements. Even if these latter two discharges were "inappropriate," the Company further argues, the two employees have already received the maximum remedy allowable under Board law—placement on a preferential hiring list as

economic strikers, and reemployment as soon as jobs became available. One striker, a probationary employee according to the Company, was discharged for alleged absenteeism.

The Company also alleges various events which compelled it to take protective and legal action. Thus, it contends that it suffered unusual property damage and suspected "sabotage" during the strike. Plant Manager McCollum stated that the blades of a "chipper"—a machine which converts pieces of wood into chips—were destroyed by a bullet which was found in the machine. A "gear box" was damaged because a "worm gear" was installed backwards. (Striker James Kelly, a maintenance expert, said this was impossible.)

Wires to a pump which controlled water to the boiler were cut, according to McCollum, which could have resulted in serious damage if the boiler exploded. Security Guard Richard Brown stated that he had a conversation at his father's house with striker Scott Fowler, who said that the boiler would not run when they tried to start it up. No water could get to the boiler when attempts were made to start it, and an investigation in which Brown participated determined that the wires were cut. (Fowler admitted a conversation with Brown at his father's house, but could not recall any discussion about the boiler.)

McCollum asserted that, after the strike began, nails and crates were found in the driveway, rocks were thrown, shots were fired in the plant, and there was mass picketing preventing access to the plant. After the cutting of the wires to the boiler pump, the Company hired a security dog service.

The Company also sought and obtained from a Georgia state court an injunction restraining the Union and in-

dividual strikers from engaging in various activities including damage to Company property, and sundry other alleged threats and intimidation.

The injunction also regulated the Union's conduct of picketing. Thus, the Union and individual strikers were enjoined *inter alia* from maintaining more than four pickets at any one time at an entrance to the Company's property, and from blocking or interfering with ingress and egress from Company property.

Following is a discussion of the factual issues in individual cases, including the evidence of alleged employee misconduct.

2. *The Discharges Alleged by the Company to Have Been Decided Upon Prior to the Strike*

(a) *James Kelly*

Kelly was the chief Union steward at the time of the strike. His separation notice states that he was terminated because he told the plant manager (McCollum) on the day of the strike (November 15, 1979) that he had "engaged union people in an organized plant slow down," allegedly in violation of the labor agreement.

McCollum testified to a conversation with Kelly a few minutes before the strike began, in which both McCollum and Kelly expressed regret that matters had come to a strike. Kelly said, according to McCollum, "We did not have anything to do with the chipper incident. . . . The only area that we had planned to slow down during this was the Green End department. We didn't have to do anything to it, because Maintenance took care of it."

Kelly testfiied that he told McCollum, "We had plans, but did not have to implement them, to slow down the

place because of the mechanical breakdowns . . . ." Kelly averred that these were the plans only of a few Union members, but that the official Union policy was to increase production because the lumber was becoming damaged by rain.

Green End Superintendent Jack Harbin said that he received a report that Kelly was causing general disruption in the plant a few days before the strike. McCollum and Harbin also testified that Kelly, a maintenance mechanic, was assigned to repair the trimmer, but took an unusually long time to do so. Kelly said that this was true, and that the reason was a faulty "printed circuit," normally not defective.

McCollum reported the conversation about the slowdown to Broughton R. Kelly, Director of Industrial Relations, and the decision to discharge James Kelly was made that day. According to the Company, Kelly was not notified immediately for the reasons given above.

Analysis of the Evidence

Although there is some ambiguity in the meaning of Kelly's slowdown statements attributed to him by McCollum, crediting Kelly, I find that he told McCollum that a slowdown had been planned but had not been implemented because of mechanical breakdowns. I attach little weight to Harbin's testimony about "general disruption" caused by Kelly because of its vagueness.

Accordingly, although the Company has established that Kelly told McCollum that a slowdown was "planned," the General Counsel has established that Kelly did not, as alleged in his separation notice, tell McCollum that he "engaged" in a slowdown with other employees.

(b) *Joseph M. Williams*[30]

Williams' termination notice states that he was discharged because of vulgar language "directed to" his supervisors just before the strike, and abusive, obscene language "to" nonstriking personnel during the strike.

Supervisor Rutledge testified that Williams was assigned the task of sweeping just before the strike started on November 15. As Karen Eley, a nonstriking employee, was entering the plant, Williams said in colloquial language that he would like to engage in sexual intercourse with her. Willams also asked, according to Rutledge, "I wonder who is going to keep these sons-of-bitches from getting their asses whipped." In response to inquiries from other employees, Williams said that he meant the supervisors.

James L. Coone, a supervisor at the time, testified to sexual remarks by Williams to Eley and also to Barbara Lawler. Also, according to Coone, Williams called out to McCollum, "Come on down here, I'll whop your ass," and, "You better get somebody to follow you home this evening." Green End Superintendent Jack Harbin gave similar testimony.

Lawler herself described vulgar language from another employee, on another occasion, but said nothing about Williams. Eley did not not testify. Her affidavit is in evidence, but does not mention Williams. McCollum said only that Williams was discharged for "immoral and indecent conduct, insubordination, and an uncivil attitude towards his supervisor." On cross-examination, McCollum did not know the name of the supervisor to whom Williams was allegedly insubordinate, and said that Williams was not insuborinate to McCollum himself. Further, according

30. Williams is referred to in the first complaint and the transcript as "Mike" Williams.

to McCollum, no female employees reported indecent remarks made to them by Williams, although a male supervisor had reported such language.

Rutledge also testified that he was leaving the plant with Harbin early one morning during the strike and that Williams and others were sitting in front of the guard shack used by the pickets. Harbin told the pickets that they were "not obeying the restraining order of walking the picket line." Williams said, "Damn it, if that's the way you feel about it," picked up a rifle leaning against the shack, and held it in the port position. Harbin testified that he told Williams he was not picketing properly, but did not actually see Williams pick up a rifle.

Williams denied all the statements attributed to him with respect to Lawler and Eley, and denied seeing either of them on the morning the strike began. He denied seeing McCollum on that occasion or making any statements to him. Williams acknowledged seeing McCollum and Harbin leaving the plant early one morning when Williams was standing near a "hut." Harbin asked whether Williams and other employees with him had seen the restraining order. Williams said that he had not, and Harbin said that they were going "to get the law" if Williams and the other employees weren't on the picket line in so many seconds. Williams replied, "If that's the way you feel, go get it." However, he denied reaching for a gun or any other object.

Analysis of the Evidence

It is significant that neither McCollum, Lawler nor Eley—allegedly objects of verbal abuse from Williams—made any firsthand complaint about him. The fact that McCollum believed the "insubordination" remarks to have been made to another supervisor supports Williams' denial

that he even saw McCollum. I do not credit Coone's testimony about statements allegedly made directly by Williams to McCollum, or obscene remarks allegedly made directly to Lawler or Eley. Accordingly, the specific allegation in Williams' separation notice has not been established. However, I credit the evidence to the effect that Williams spoke *to other employees* about supervisors getting "their asses whipped," and made the alleged sexual statements about Lawler and Eley heard by other employees.

Williams' testimony about the early morning incident outside the plant is more explicit than Rutledge's, and I credit Williams' version. Because it was dark at the time, Rutledge could easily have been mistaken about Williams picking up a gun, and I credit the latter's denial. As noted, Harbin did not see a gun. The credited evidence thus shows that Harbin told Williams that they were going to get the law on him if he did not start picketing (or picketing properly), and Williams told him to go and get it (the law). However, this incident is not alleged in Williams' separation notice as a reason for discharge.

In sum, the Company has established that Williams made remarks about female employees and supervisors to other employees, but the General Counsel has established that these remarks were not made directly to the female employees and supervisors as alleged in the separation notice.

(c) *Terri Bowden Fuller*[31]

Fuller was a probationary employee hired on September 10, 1979, and was discharged on December 11, 1979—because of Union activity according to the General Counsel, and because of excessive absenteeism according to the

31. Fuller is referred to as Bowden in portions of the record.

Company. The Company's "Report of Exit" states that she was absent on three occasions, and late on another in "48 scheduled work days." The notice also states that Fuller was told she was terminated because she was not dependable. The parties stipulated that there were no warning notices or formal reprimands in her personnel file prior to termination.

Fuller testified that she was hired with a 45-day probationary period, and that her supervisor, Thomas Haynes, spoke to her once about being out of work. "I was out two days that time," she testified. Fuller stated that she had a virus and a doctor's excuse. Haynes made no response to that, said she was a good worker, and he would like to keep her, but did mention her absenteeism. Another supervisor, Hogan, gave her a book on "grading" and told her to study it.

Fuller testified that she went out on strike, carried a picket sign, and was seen by Industrial Relations Manager Barbara Lawler and by employee Margaret Gregory. When Fuller returned after the strike, she was told by Haynes that she was being discharged because of excessive absenteeism.

Lawler testified that she herself crossed the picket line frequently during the strike, but never saw Fuller. Fuller was absent three or four times and late once, and was therefore terminated as a probationary employee. There are no strict rules for assessment of probationary employees, according to Lawler. The Company submitted termination papers of other such employees discharged for similar reasons.

Lawler confirmed Fuller's testimony that the probationary period is 45 work days. Probationary employees are normally discharged by the supervisor, after consulta-

tion with Lawler, near the end of the probationary period. Fuller was near the end of her probationary period when she was terminated, but not over it, despite the 48-day reference on her exit report, according to Lawler. Although 48 days were "scheduled," the absences brought the days "worked" down to 45 or less. Fuller was not notified until she returned from the strike because there was no opportunity until then for the customary discussion between her and her supervisor.

Margaret Gregory testified that she worked at the plant during the strike, crossed the picket line every day, and never saw Fuller. Plant Manager McCollum said that he never saw her. Finishing Superintendent Larry Hogan stated that Fuller was a good employee and that he gave her a book to study in the belief that she might become a grader. However, she was fired because of absenteeism.

Charles K. Prather, a striker, testified that he returned to work after the strike as the Union's chief steward. (As indicated, former chief steward James Kelly was discharged.) In December 1979, Prather attempted to engage in a "discussion" with McCollum concerning Fuller, arguing that Fuller had not been absent as many times as alleged. According to Prather, McCollum replied that there was no formal contract and therefore no grievance procedure, and that Fuller was a probationary employee.

McCollum acknowledged a conversation with Prather about Fuller, and denied ever telling Prather that there was "no union present." However, he did not contradict Prather's testimony that the latter attempted to present a grievance concerning Fuller, and that he, McCollum, said there was no grievance procedure.

Article 4 of the labor agreement, which expired November 15, provides in relevant part: "All new employees

shall be considered as being probationary employees during the first forty-five (45) days worked. The Company shall have the right to terminate or lay off probationary employees and such terminations or layoffs shall not be subject to the grievance procedure or to arbitration."

Article 9, section 1, describes a "grievance" as a claim that the Company has violated the Agreement. "Grievances shall be limited to the interpretation and application of the terms in this Agreement. If the Company feels that a grievance is not valid or arbitrable, it will proceed to answer and process the grievance in accordance with all terms of this Article, but this will not waive the Company's right to challenge the validity or arbitrability of the grievance."

Article 9, section 2, provides that all grievances shall be handled "exclusively" in the manner set forth in the Article. Step 1 allows the employee "a reasonable period of time to present the grievance to the supervisor on his regular shift." In the event the grievance is not resolved, Step 2 allows the employee five days after the supervisor's decision to appeal the decision in writing to the plant manager, citing the provision of the labor agreement alleged to have been violated. Other provisions specify a third step, and arbitration.

Analysis of the Evidence

Disposition of the complaint allegation concerning Fuller requires a determination as to whether she was a probationary or regular employee at the time of her discharge. She remained a probationary employee under the labor agreement through her 45th day of work. Her exit report shows that 48 days were "scheduled," and Lawler testified that Fuller was absent three or four times and late once. If Fuller was absent three times, she

could not have worked more than 45 days, and would have remained a probationary employee. Fuller's supervisor spoke to her about her absenteeism, and Fuller herself acknowledged being absent two days "that time," suggesting that there were other times. I credit Lawler's testimony on Fuller's absences and find that she was a probationary employee at the time of her discharge.

I also accept Lawler's testimony on the practice of having probationary employees discharged only after a discussion with their supervisor, and conclude that this was the reason Fuller was not discharged until the day after the strike ended.

I credit Fuller's testimony that she was on the picket line, and the testimony of the Company supervisors that they did not see her. This is not inconsistent testimony.

I also credit Prather's testimony that he returned after the strike as chief steward and, in a discussion with McCollum, attempted to present the Fuller discharge as a grievance. I also credit Prather that McCollum replied that there was no formal contract and therefore no grievance procedure. McCollum's denial that he said there was "no union present" does not meet Prather's testimony. I therefore find that the Union attempted to present an oral grievance on the Fuller discharge to Plant Manager McCollum, and that the latter refused to process it, saying there was no formal grievance procedure. However, since Fuller was a probationary employee, her termination was not subject to the grievance procedure. I also find that the grievance was not presented in the manner required by the expired contract in that it was not first presented to Fuller's supervisor, Haynes, as required by Step 1, and thereafter in writing to McCollum.

I conclude that the Company has established its stated reason for Fuller's discharge as a probationary employee.

3. *Alleged Employee Misconduct During the Strike*

(a) *Scott Fowler—The Gun Incident*

Fowler's separation notice states that he was terminated because he attempted to shoot out plant lights with a slingshot, and pointed a gun in the direction of the plant manager.

Plant Manager McCollum testified that, on the first Monday following the date that the strike began (November 15), there was considerable excitement as nonstriking employees came to work through the picket line. McCollum stated that a truck driver reported to him that an individual was standing on a county road which runs alongside the plant.

McCollum looked through binoculars he was carrying and said that he recognized Scott Fowler. Fowler made a clenched fist, went back to a car and got a gun and pointed it at McCollum. The latter asserted that he was terrified, sought cover, and observed Fowler again from another location. McCollum called the sheriff and reported the matter about 30 minutes later to Union Representative Barnes, who told him that there was no bolt in the gun. Dean Clay, a Company security officer, testified that he saw Fowler pointing a rifle with a scope on it at the mill, with the police arriving a few minutes later. Larry Hardwicke, a Company employee, testified that he drove past Fowler on the road and saw him looking through a rifle scope which was pointed at persons in the mill area.

Union Representative Barnes testified that McCollum complained about an employee on a hill with a gun. Barnes went and investigated, and discovered Fowler with a rifle scope looking down toward the plant. Barnes told Fowler not to have a gun up there, and Fowler replied that he had not taken his gun out, merely the

scope. He added that the clip and bolt were not in the gun. Barnes returned to the plant and told this to McCollum.

Fowler testified that he drove along the county road, parked, got out of the car, and saw some people at the plant watching him through binoculars. The record contains a variety of estimates and a diagram concerning Fowler's distance from the plant. Whatever the actual distance, it is apparent that it was close enough for Fowler to see that others were watching him.

Fowler testified initially that he had been out deer hunting and had a rifle. He took it out of the car, removed the scope, put the rifle on the trunk of the car, and looked at the plant through the scope while leaning over the car. The bolt was not in the rifle. The witness later testified that he re-attached the scope to the rifle, in a manner whereby he pointed the rifle at a plant log yard. However, Fowler also said that he may have pointed the rifle "over the plant" while holding it to his shoulder in a firing position. A deputy sheriff came by, asked what he was going, and kept going. Someone else told him that he had better leave, because he had "scared everybody to death."

Analysis of the Evidence

Fowler was an equivocal and unreliable witness. I credit Barnes' testimony that Fowler told the Union representative that he had not taken the gun out of his car—a statement clearly contradicted by Fowler's own testimony. Fowler's pre-trial affidavit, which is in evidence, contains other contradictions. I credit McCollum's uncontradicted testimony that Fowler first clenched his fist at McCollum, and McCollum's later testimony that Fowler then got a gun from his car and pointed it at McCollum.

McCollum's testimony is corroborated by Clay and Hardwicke, partially corroborated by Barnes, and partially admitted by Fowler. From the fact that Fowler could admittedly see people looking at him before using his scope, and the fact that he clenched his fist at McCollum, I infer that his action was intended to be a threatening gesture.

I conclude that Fowler in fact pointed a gun in McCollum's direction as alleged in his separation notice.

(b) *Kenneth V. Palmer—Alleged Picket Line Threats of Violence*

Palmer's separation notice states that he was discharged for attempting to damage Company property with a slingshot, and for threatening an employee attempting to cross the picket line. At trial, the Company also contended that Palmer picketed with an axe in hand.

Plant Manager McCollum testified that the manager of the security dog service gave a demonstration involving a dog "attacking" a man, which took place about 10 to 15 feet from the picket line. After the demonstration began, Palmer picked up an axe which the pickets used for chopping wood, but McCollum did not see him carrying it on other occasions. Lawler testified that she saw Palmer with a picket sign and an axe, but could not recall seeing dogs in the vicinity.

Green End Superintendent Harbin testified that he saw Palmer driving recklessly near groups of strikers on the road. A "strike log" maintained by Lawler notes that "Harold Whitney" saw Palmer handling a gun in the back of his car, and "threatening them w/ax."

John W. Todd, a Company employee, testified that a supervisor called Todd after the strike began and asked

him whether he desired assistance in coming to work. When Todd replied in the affirmative, the supervisor led Todd up to the gate, each driving his own vehicle. Two strikers walked in front of Todd's vehicle as he approached the gate and he stopped. One employee asked Todd whether he was going in and, when Todd replied in the affirmative, the other said that it would be "mighty bad" for him to do so. The other employees stepped aside, and Palmer asked, "You say you're going to work?" When Todd again replied affirmatively, Palmer said that he would see him in the pool room. Palmer attempted to approach Todd's truck, but other employees held him back. Todd could tell that Palmer "wasn't joking," and therefore did not go into work.

The Company strike log contains a November 20 note that Palmer "threatened" a truck driver attempting to make a delivery into the plant, but the driver nevertheless entered.

Analysis of the Evidence

This evidence is insufficient to establish any misconduct on Palmer's part. His carrying the axe on the picket line may have been caused by fear of the dogs. In any event, it did not involve any threat to another employee, and was not alleged in his separation notice. Although Lawler could not see any dogs, they were clearly on the premises, and according to McCollum a demonstration was held a few feet from the picket line.

Palmer's words reported by Todd are too innocuous to constitute a threat, no matter how Todd interpreted them or Palmer's asserted attempt to get to Todd's truck. The "strike log" notes are too vague, and lack the probative force of live testimony, to constitute evidence of

misconduct. It is unlikely that Palmer would have been endangering the lives of his fellow strikers, as Harbin charges, and this was not alleged in the separation notice. Although Palmer did not testify, I see no reason to draw an adverse inference from this fact absent a *prima facie* case of misconduct.

I conclude that the Company has not established the threat to another employee alleged in Palmer's separation notice.

(c) *Phillip J. Faulkner/Scott Fowler/Kenneth V. Palmer—The Slingshot Incident*

Faulkner's separation notice, like that of Palmer, alleges an attempt to damage Company property with a slingshot.

Company Security Officer Dean Clay testified that, about a week and a half after the strike began, he saw Faulkner, Fowler, and Palmer using a slingshot to shoot at a light over a rail spur near or on Company property. He also saw broken glass under the light, but the light was not broken. This testimony was corroborated by Security Officer Wally Steed, although the witness identified only Fowler and Palmer with certainty. Steed said that the slingshot used steel pellets, and was of a kind used for game hunting. McCollum said that the light "appeared" to be broken, but he did not see any glass.

Fowler testified that Faulkner, Palmer, and he took turns shooting at a bird on a rail car on the spur, which is on Company property. They did not shoot at or damage the light, and Fowler informed Supervisor O'Neal of this fact when he returned to work. O'Neal did not testify about this incident.

Analysis of the Evidence

It is clear that the three employees were firing at something on Company property with a slingshot. I find that they were in fact firing at a bird rather than a Company light, and did not damage the light.

Although Faulkner's and Palmer's separation notices allege an attempt to damage Company "property," rather than lights as in Fowler's notice, I interpret the former two notices to mean the same thing as Fowler's notice, in light of the Company's position at hearing. Although the Company argued that the railroad boxcar itself may have been damaged, I conclude that this is a trivial argument, and that the General Counsel has established that the above-named three employees did not engage in the actions alleged.

(d) *Michael W. Buttram—Nails on Plant Entrance Way*

Buttram's separation notice states that he was discharged in part for his presence on the picket line when large nails were discovered at the entrance. Broughton Kelly testified that Buttram was present at times when the nails were there, but said that he did not know who distributed the nails. This is clearly insufficient to charge Buttram with any offense, nor is it sufficient to establish that the Company had an honest belief of same.

(e) *Landis Bishop/Jeffrey A. Hughes—Visting Home of Nonstriking Employee and Threatening Him*

The separation notices state that the above-named employees visited the home of a nonstriking employee and threatened his family and property.

William A. Walker testified that he did not go on strike, that Bishop and Hughes visited him at his home, and that a conversation took place. The evidence indicates that the two employees stood outside an opened glass door, with a screen door remaining closed. Walker's pregnant wife and young daughter were present. Walker said that Bishop and Hughes were drunk, cursed, and said that he was "screwing them out of their . . . damn money" by working during the strike. Bishop said that he would "take care of" Walker if he returned to work—a statement repeated by Hughes. Walker asked them to leave early in the conversation, but they took their time doing so.

Bishop said that he had been a Union steward, and that Walker was a probationary employee who had asked Bishop when he could become a Union member. He went to Walker's house to find out why he had returned to work. According to Bishop, Hughes had had only "one half of one beer," and the only improper language was the word "damn." Hughes said that Walker was "messing with a lot of other people's money." Walker asked whether they had come to threaten him, and Bishop denied it. However, Bishop stated that he told Walker that if he went back to work, he might be doing it at his own risk. Although neither Bishop nor Hughes would hurt him, other people might do so, according to Bishop.

I credit Walker's version of this incident, and find that the Company has established that Landis and Hughes threatened Walker with bodily injury.

(f) *Michael Buttram/Robert Barry McCoy/Anthony Crouch/Mary Burth/James O'Neal/Eulice Favors/Yvonne Blalock/Charles Brown/John Ward/Cecil C. Barber/Carlene Frost—Alleged Mass Picketing and Blocking Access to Plant*

The separation notices of the above-indicated employees state that they engaged in mass or illegal picketing and/or engaged in blocking access of vehicles to the plant.

Margaret N. Gregory, a Company employee, testified that she saw the above-named strikers, except O'Neal, picketing when a yellow station wagon turned into the plant. The witness alternately testified that the pickets were standing "around" the vehicle, and "alongside" it. They spoke to the driver and the car then left. Gregory did not know the identity of the occupants, who may have been strikers, according to her testimony. Gregory also saw a blue and white Mack truck loaded with logs, which was stopped by the same employees, and left. About 125 vehicles entered and left the plant daily, and these were the only two instances where vehicles were stopped, according to the witness.

Barlow testified he was at the plant entrance with 10 to 12 other employees when a truck loaded with logs approached. Barlow, who was standing at the side of the road, put up his hand and the truck stopped. The driver asked "what was going on"; Barlow replied that they were on strike and asked the driver to honor the picket line. Although there were other employees on the other side of the road, there were none in front of the truck. The truck turned around and left. Barlow's testimony was corroborated by Carlene Frost and Mary Burth, who were on the other side of the truck.

Mary Burth also testified that the same employees, plus O'Neal, were at the plant entrance when a brown station wagon approached on the county road leading to the driveway to the plant. Barlow raised his hand from the side of the road, and a woman driving the station wagon said she was looking for a logging contractor. The employees said that they were on strike and would appreciate it if the driver did not cross the picket line. There was no line of employees in front of the station wagon, according to Burth. There were only four employees with picket signs, with two at a time walking past one another in front of the plant entrance.

Analysis of the Evidence

I credit the testimony of Barlow, Frost and Burth on the log truck incident. Gregory was some distance away, and her testimony that the strikers "stopped" the truck is vague in comparison to the explicit descriptions of the strikers. I also credit Burth's testimony on the station wagon incident. Gregory's testimony is internally contradictory as to what the strikers did. These two incidents, out of 125 vehicles entering and leaving the plant daily, are insufficient to prove "blocking" of access to the plant. Nor do they establish "mass picketing" or violation of the state court injunction. There is no evidence that the Company has ever made such contention in the Court.

I find that the General Counsel has established that the above-named employees did not engage in the above-described actions alleged in their separation notices.

(g) *Preston D. Barlow—Abusive Language to Supervisor*

Barlow's termination notice states that he was discharged for abusive language on the picket line towards supervisors.

Industrial Relations Manager Lawler testified that, as she was crossing the picket line on the way to work one day, she heard Barlow refer to her as "that f------- bitch," and "that mother f-----, that ugly bitch." According to Lawler, Barlow referred to her as a "bitch" on another occasion. Barlow testified that he had a picket line conversation with Lawler, but could not remember, or did not think, that he made any such remarks.

Lawler was a more reliable witness. I credit her testimony, and find that the Company has established the conduct attributed to Barlow in his separation notice.

(h) *Crosby Favors—Throwing Rock at Supervisor's Car*

Favors' termination notice states that he was discharged for throwing a rock at a supervisor's car. Supervisor Virgil Williams testified that Favors threw a rock which hit Williams' car as the latter was leaving the plant. Williams' testimony is corroborated by that of Harbin. Favors did not testify. I credit the uncontradicted testimony of Williams and Harbin, and find that the Company has established the conduct attributed to Favors.

(i) *Steven Smith—Picketing with Motorcycle Chain*

Smith's termination notice states that he was discharged for improper picketing. Broughton R. Kelly testified without contradiction that he saw Smith picketing with a motorcycle chain in his hands. He also testified that Smith told him that he was afraid of the security dogs. I credit Kelly's testimony, and note that there is no evidence that Smith threatened anyone with the motorcycle chain. From this I infer that it was intended as defense against the dogs. I conclude that Smith did not engage in improper picketing as alleged in his separation notice.

(j) *Crosby Favors/Jerry Kirbo/Robert L. Russell —Threats to Job Applicant*

The separation notices of Kirbo and Russell charge them with threatening a job applicant.[32] The only evidence of the alleged misconduct consists of an affidavit of Reeves.[33] The latter asserts that he went to the plant on December 11 intending to apply for employment. Before he went in, Russell said to him that he had a better job at another plant, and that he would be the first one fired after the strike was over. Favors said that he would not be responsible if something happened. When Reeves said that he had five children, Favors said that something might happen to one of them. After Reeves had been interviewed, and as he was leaving, Kirbo said, "Say, nigger, did you get the job?"

Neither Favors, Kirbo nor Russell testified. Inasmuch as the General Counsel declined opportunity to rebut the statements in Reeves' affidavit, and because of its inherent reliability, I credit Reeves' statements made therein.

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32. Favors' separation notice does not contain any such allegation.

33. The Company served a subpoena upon Reeves, but the latter did not appear at the hearing. The Company then sought to introduce Reeves' affidavit, relying on Rules 804(a)(4) and (b)(5) of the Federal Rules of Evidence. Ruling was reserved, and the General Counsel was afforded an opportunity to introduce evidence rebutting the affidavit. He declined to do so, except for a stipulation, agreed to by the Company, that Favors "is a member of the Negro race."

The affidavit is not admissible under Rule 804(a)(4) since there is no evidence that Reeves is suffering from any of the impairments stated therein. The affidavit was taken by a Board agent, and would appear to meet the tests of reliability set forth in Rule 804(b)(5), although the Company did not make known to the General Counsel in advance of trial its intended use of the affidavit, in compliance with the Rule. However, the General Counsel's position at hearing amounts to a waiver of this requirement. Accordingly, Reeves' affidavit is hereby received in evidence, for the reasons explicated in *Alvin J. Bart and Co., Inc.*, 236 NLRB 242 (1978), enf. den. on other grounds, 598 F.2d 1267, 101 LRRM 2457 (2d Cir., 1979).

I conclude that Russell's statements were not threatening in nature. Although Kirbo's statement used racially opprobrious terminology, it was not a threat. Finally, Favors' statements are clearly threatening, but are not specified in his separation notice. I infer that Company knowledge of Favors' statements was not acquired until after his discharge and therefore that those statements were not a contributing factor in his discharge. Accordingly, I find that the Reeves' affidavit does not establish any misconduct on the part of any of the above-named employees which played a part in any of the discharges.

(k) *Robin O. Boudrie—Alleged Profanity to Supervisor*

Boudrie's termination statement alleges that a management representative told him that he was engaged in improper picketing, and that he responded, "Go to hell."

The Company's strike log for December 5 states that Boudrie and others were picketing, that Broughton Kelly told him they were doing so improperly, and that "one of them" told him to "go to hell." Kelly testified about a December 5 encounter with pickets, including Boudrie, but did not allege any statements by them. This is clearly insufficient to sustain the allegation in the separation notice.

(l) *Donald Ray Thrash—Alleged Mass Picketing*

The employee's separation notice states that he engaged in mass picketing and blocking access to the plant. There is no evidence in support of this allegation.

The Company has presented other evidence of misconduct regarding various employees, not alleged in their separation notices. I have not considered this evidence because of the fact that it was not stated on the separation

notices. Whether these allegations are true or not, the Company would have had to possess knowledge of any such conduct prior to the discharge in order to claim it as a cause of same. From the absence of any such allegations on the separation notices, I infer that the Company did not have such knowledge.

4. *Alleged Post-Strike Discrimination*

(a) *Clarence Watson and Wiley Shepherd*

The first complaint alleges that the Company discharged Watson and Shepherd[34] on December 20, 1979, because of their Union activities. Watson and Shepherd were strikers who attempted to return to their former jobs in the log yard on December 10.[35] These jobs, however, had been filled by permanent replacements and the employees were not employed on that date, but were placed on a preferential hiring list. About 10 days later, Watson and Shepherd were notified to come back to work, and were offered jobs in the storeroom at a substantial cut in pay. Both declined these jobs, and were thereafter terminated. In February 1980 both were offered their former jobs, and accepted. Although the stipulation of the parties makes it uncertain which shift Watson had, Shepherd simply testified that he returned to his former job.

The General Counsel concedes that the Company was not required to return economic strikers to substantially equivalent jobs, if none were available because they had been filled by permanent replacements. However, he

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34. The spelling of Shepherd's name appears as given in the official transcript rather than the complaint.

35. Of the two alleged discriminatees, only Shepherd gave testimony. The Company argues that an adverse inference should be drawn from the fact that Watson did not testify. However, Lawler's testimony is sufficient to warrant the findings made herein about Watson.

argues that an employer may not appropriately discharge such striker because of the latter's refusal to accept a lesser job, and, as noted, the complaint alleges that Watson and Shepherd were discharged because of their Union activities.

The Company denies the charge of discriminatory motivation, and argues that even if the discharges were "inappropriate," the employees suffered no legal damage. As economic strikers, they were entitled to no more than placement on a preferential hiring list so long as their jobs were filled by permanent replacements, and they were put back to work as soon as jobs were available.

There is little or no dispute about the facts, and only legal issues are presented.

(b) *Mary Burth and Carlene Frost*

The second complaint alleges that the Company, on February 12, 1980, refused to pay accrued vacation pay to the above-named employees because of their Union activities, in addition to allegation in the first complaint that they were discriminatorily discharged.

Article 22 of the labor agreement which expired November 15 provides *inter alia* that employees hired prior to February 2, 1978, with one or more years of continuous service, shall be entitled to two weeks of vacation, provided that the employee worked not less than 1,800 hours during the preceding calendar year. A vacation roster is posted in January, and employees have until March 1 to select vacation weeks. The Company may allow vacation pay in lieu of time off. Neither vacations nor vacation pay shall be accumulative from one year to another. "Voluntary termination of employment or discharge shall constitute a complete break in service continuity and no past service shall be credited in case of re-employment."

Carlene Frost's separation notice[36] states that she was employed from October 19, 1976 to November 15, 1979, at which time she was terminated for allegedly engaging in mass picketing and blocking access to the plant. Mary Burth's separation notice states that she was employed on March 29, 1976, and was terminated at the same time as Frost for the same alleged reason. As described above, the Company has not submitted proof sufficient to establish any such conduct on the part of either employee.

Frost testified that, a few days after the strike began, she and other strikers were picking up their pay from Company employee Margaret N. Gregory at "Bill's Dollar Store." Frost asked Gregory about the "vacation checks," and Gregory replied that they would probably be in the following week. When Frost returned the following week, Gregory said that the checks had come in, but had to be sent back. McCollum was present, and said that the employees were not going to get the vacation checks. At one of McCollum's February 1980 meetings with returning employees, he was asked about vacation checks, and said he would check into it. Frost has heard nothing further about the subject.

Mary Burth corroborated Frost's testimony regarding McCollum's statements in February. The witness said that she received her 1980 vacation pay, but received only one instead of two weeks for 1979. As to the latter, the witness stated that she had the requisite 1,800 hours.

Industrial Relations Director Broughton Kelly testified that Frost and Burth had requested vacation pay, but had not received it. The reason, he stated, was that the employees had not requested vacations or vacation pay in the year in which it was due, and that vacations could not

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36. Frost's separation notice lists her as "Merriam C. Frost."

be carried forward into another calendar year. He believed that one of the employees did not have the requisite 1800 hours, but was not sure.

Analysis of the Evidence

I find that both Frost and Burth had satisfied the contractual requirements for entitlement to two weeks of vacation pay for 1979. It is clear from their separation notices that both were hired prior to February 2, 1978, and had at least one year of continuous service. Under the contract, entitlement to 1979 benefits required at least 1,800 hours of work in the preceding calendar year, i.e., 1978, plus a timely request.

Burth testified that she satisfied the 1,800 hour requirement although Frost was silent on this subject. However, Frost credibly testified that, in response to her inquiry to Gregory at "Bill's Dollar Store," Gregory replied that the checks had come in but had to be sent back. McCollum said to Frost at "Bill's Dollar Store" that the employees were not going to get them. From these facts I infer that both Frost and Burth had satisfied the formal requirements for two weeks of vacation, or pay in lieu thereof, since it is unlikely that the checks would have received this amount of processing without being due and payable to the employees. Broughton Kelly's testimony to the contrary is not as persuasive as the routine of business office practice, and, moreover, did not appear to be based on sure knowledge of the facts. I also credit Frost's and Burth's testimony that they asked about their checks in February 1980, that McCollum said he would check into it, and that neither has heard anything about the matter since that time.

I therefore conclude that Frost and Burth satisfied the contractual requirements for two weeks of vacation,

or pay in lieu thereof, for 1979, but were not completely paid by the Company.

5. *Legal Analysis of Alleged Section 8(a)(3) Violations*

(a) *The Issue of Discriminatory Motivation*

As described above, there were at least twice as many strikers as the 28 alleged discriminatees. This is based on Lawler's testimony that she saw about 60 pickets during the first days of the strike. If McCollum's estimate of 140 pickets is correct, the number of strikers compared to alleged discriminatees is even greater. The total employee complement was about 200.

Other than the alleged discriminatees, the strikers were put back to work on the second shift when the strike ended, with some exceptions who were placed on a preferential hiring list. There is no suggestion that any of these strikers were subjected to any unfair labor practices. The Company asserts that it singled out the 28 alleged discriminatees because of strike misconduct.

In similar circumstances, Board and court cases have concluded that absence of employer disciplinary action against some employees engaged in protected activity is evidence that disciplinary action against other such employees was not discriminatorily motivated.[37] I conclude that this evidentiary principle is determinative herein on the issue of the Company's motivation.

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37. *Teledyne McCormack Selph, A Division of Teledyne, Inc.*, 246 NLRB No. 127 (1979); *Pedro's Inc. d/b/a Pedro's Restaurant*, 246 NLRB No. 92 (1979); *Triana Industries, Inc.*, 245 NLRB No. 161 (1979); *Bill Kraft's Restaurant Food Products Co.*, 241 NLRB No. 162 (1979); *J. Ray McDermott & Co., Inc.*, 233 NLRB 946 (1977); *B. F. Goodrich Co.*, 232 NLRB 1066 (1977); *Winn-Dixie Stores, Inc. v. N.L.R.B.*, 448 F.2d 8, 78 LRRM 2375 (4th Cir., 1971), enf. as mod. 181 NLRB 611 (1970); *Hyster Co. v. N.L.R.B.*, 480 F.2d 1081, 83 NLRB 2801 (5th Cir., 1973), enf. as mod. 198 NLRB 192 (1972).

It may further be noted that there is a dearth of anti-union statements and action by the Company. All of the alleged independent violations of Section 8(a)(1) are without foundation and should be dismissed, except the Company's statement to employees that there was no formal grievance procedure. This latter statement was accurate in the sense that there was no existing contract at the time, and becomes a violation only because of the somewhat esoteric principle that the grievance procedure survives the expired contract. I conclude that the Company was simply unaware of this requirement, and that McCollum's statements reflected lack of knowledge and indecision, rather than anti-union animus. This conclusion is buttressed by the fact that in all other respects the Company was quite scrupulous in its observation of employee rights—such as the policy of having a Union steward present during disciplinary interviews, where possible and where desired by the employee.

I find no merit in the General Counsel's argument that the Company's delay in notifying employees of their discharges is evidence of unlawful motive. The evidence is persuasive that Company disciplinary policy was consultative in nature, with final authority in some cases being exercised by Broughton Kelly. There is an inevitable delay in any such policy. There is also the fact that most of the dischargees were not present in the plant at the time of the alleged conduct warranting dismissal.

Finally, the Company delayed in such notification not because of any discriminatory motivation, but, rather, because it sought Union agreement on the subject of discipline of employees. Although the separation notices are dated November 15, the Company initially hoped to avoid conflict on this subject with the Union. Broughton Kelly said that he wanted to "get on board" with this subject,

and first broached it in the December 3 negotiating session, as described above. At that date, according to his credible testimony, the Company was willing to consider discipline less than discharge. However, the Union failed to agree then and also failed to agree to the Company's December 19 Memorandum of Understanding incorporating the subject of discipline. The Company discharged the employees the following day, December 20, 1979. Rather than constituting evidence of unlawful motive, the Company's delay in discharging the employees evidences its desire to obtain accord with the Union on this subject.

The grounds which the Company sought to establish for Union approval of striker discipline further show that concern for misconduct rather than anti-union animus was the motivating force in the Company's action. Thus, it is quite clear that serious misconduct did occur. A gun was pointed at the plant manager, the wires to the boiler were cut, and a rock was thrown at a supervisor's car, to name a few. It is true that not all the Company's accusations of misconduct are warranted, and that it may not justifiably impute general misconduct to a specific employee absent proof involving that individual.[38] However, the rather widespread acts of violence and near violence, culminating in the state court injunction, suggest that the Company had a genuine problem, and that it was that problem rather than opposition to the Union which caused it to take the action that it did.

In the final analysis, the employees were discharged on December 20. Actually, the Company denied them work on December 10, at the time the other strikers returned and were put back to work. As previously indi-

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38. *American Cyanamid Co.*, 239 NLRB No. 60 (1978).

cated, I conclude that this action by the Company constituted disciplinary suspension of the employees on December 10, because of alleged misconduct during their exercise of protected activity, to wit, the strike.

It is established law that the discharge of an employee engaged in protected activity, for alleged misconduct which did not in fact occur, violates Section 8(a)(1) of the Act regardless of the employer's motivation.[39] Although the discharges did not technically take place until December 20, 1979, there is no logical reason why the same principle should not apply to the disciplinary suspensions on December 10. These considerations make necessary a legal assessment of the individual acts of alleged misconduct described above.

(b) *Legal Analysis of Individual Misconduct*

1. *Violence and threats of violence*

Strikers Scott Fowler's clenching his fist and pointing a gun at Plant Manager McCollum are serious acts of misconduct warranting discharge, and I so find.

As set forth above, the evidence establishes that striker Crosby Favors threw a rock which hit Supervisor Virgil Williams' car as the latter was passing through the picket line. The Board has concluded that discharges based on similar conduct were lawful,[40] and the same conclusion is warranted herein.

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39. *N.L.R.B. v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964); *Roadway Express, Inc.*, 250 NLRB No. 61 (1980). Where the employer proves an "honest belief" in the alleged misconduct, the burden then shifts to the General Counsel to establish that the employee did not in fact engage in such conduct or engaged in other conduct not sufficiently grave to warrant discharge. *Rubin Brothers Footwear, Inc.*, 99 NLRB 610 (1952).

40. *Gold Kist, Inc.*, 245 NLRB No. 142 (1979); *Giddings & Lewis, Inc.*, 240 NLRB No. 64 (1979); *New Fairview Hall Convalescent Home*, 206 NLRB 688 (1973); *Spotlight Company Inc.*, 192 NLRB 491 (1971).

The credited evidence establishes that Landis Bishop and Jeffrey A. Hughes visited a nonstriking employee at his home and, in the presence of his family, threatened him with bodily injury if he returned to work. The Board and one Circuit Court of Appeals have decided that similar action warranted discharge of employees,[41] and I find that this principle is applicable to Bishop and Hughes.

As heretofore delineated, the only striker comment to job applicant Raymond Reeves which was threatening was that of Crosby Favors, who said that he would not be responsible if something happened to Reeves, and that something might happen to his children. However, this threat was not alleged in Favors' separation notice, and therefore could not have been a cause of the Company's first suspending and then discharging him. In any event, I have already determined that Favors engaged in other misconduct warranting discharge.

Although the credited evidence shows that Joseph M. Williams made statements to other employees about supervisors "getting their asses whopped," and similar statements, he did not make these statements directly to supervisors. I therefore find that Williams did not make threatening statements to supervisors warranting discharge, as alleged in his separation notice.

2. *Obscene and abusive language*

Industral Labor Relations Manager Barbara Lawler heard Preston D. Barlow make the profane statements about her, described above, as she drove through the picket line.

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41. *Otsego Ski Club-Hidden Valley, Inc.*, 217 NLRB 408 (1975); *New Fairview Hall Convalescent Home, ibid.; N.L.R.B. v. Syncro Corp.*, 597 F.2d 922, 101 LRRM 2790 (5th Cir., 1979), den'g. enf. 234 NLRB 550 (1978).

Board cases on employee profanity to supervisors as grounds for discharge come down on both sides of the issue. On the one hand, it is held that such language is customary in industrial settings.[42] There are, however, cases which conclude that profane language to supervisors constitutes misconduct of sufficient gravity to warrant disciplinary action.[43]

Some cases appear to make distinctions based on the sex of the employee or supervisor involved, considering offensive remarks to be more opprobious if made to a female.[44] One Circuit Court of Appeals described similar language, and an overt gesture, as "vulgar and offensive by any standard of decency.[45]

I find that Barlow's statements about a supervisor, made within her hearing in the presence of other employees, were sufficiently insulting and abusive so as to justify his discharge. In making this determination, I take into account the minimal anti-union animus on the part of the Company, and the consequent likelihood that it was Barlow's statements rather than his strike activity which precipitated the Company's action.

The facts involving Joseph M. Williams' statements about Lawler and Eley require a different conclusion, however. Neither Lawler nor Eley heard the statements, which were made to other employees on the morning of November

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42. *Van Guard Carpet Mills*, 246 NLRB No. 106 (1979); *Publisher's Printing Co., Inc.*, 246 NLRB No. 36 (1979).

43. *Rockland Chrysler Plymouth, Inc.*, 209 NLRB 1045 (1974). See also *Atlantic Steel Co.*, 245 NLRB No. 107 (1979), where the Board overruled the Administrative Law Judge on this issue and deferred to an arbitrator's award.

44. *Veeder-Root Co.*, 192 NLRB 973 (1971).

45. *Mueller Brass Co. v. N.L.R.B.*, 544 F.2d 815, 94 LRRM 2225, 2228 (5th Cir. 1977), den'g. enf. 220 NLRB 1127 (1975).

15 a few minutes before the strike began, in an atmosphere of turbulence. It is obvious that offensive remarks have greater impact if made to, or heard by, the person about whom they are made. I conclude that Williams' remarks about Lawler and Eley, not heard by either of them, were not serious enough to justify his discharge.

3. *Property damage*

It is clear that the Company suffered at least some property damage directly caused by deliberate human action, such as the cutting of wires leading to the boiler, and nails in the driveway causing flat tires. As noted, the evidence does not link this to identified strikers. Other acts of "sabotage" alleged by McCollum are less clear, such as the bullet in the chipper.

In the "slingshot incident," where Faulkner, Fowler, and Palmer were charged with attempting to break an overhead light, they were actually shooting at a bird on a railroad boxcar. Granting that the Company may have believed in good faith that the employees were attempting to shoot out a light, this belief was mistaken, and the allegation does not serve as justification for discharge.[46]

4. *Alleged slowdown*

The evidence shows that James Kelly told McCollum that he and others had planned a slowdown, but that this did not take place because of mechanical breakdowns. The Company had no reasonable grounds to believe that one had taken place, based on Kelly's statement to McCollum. The actual conduct was therefore only talk about an inchoate slowdown which never took place. The Board has concluded that where employees merely engaged in

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46. *The Blair Process Co., Inc.*, 199 NLRB 194 (1972).

"tentative and untested" sentiments against working alone, there was no partial strike warranting discipline,[47] and the same principle is applicable in James Kelly's case. If the Company had a good faith but erroneous belief that Kelly had done so, the result would not be different.[48]

5. *Summary of misconduct cases*

For the reasons given above, I find that strikers Scott Fowler, Crosby Favors, Landis Bishop, Jeffrey A. Hughes, and Preston D. Barlow engaged in strike misconduct, known by the Company prior to their discharges, of sufficient gravity to warrant such discipline. I also find that none of the other alleged discriminatees charged by the Company with misconduct[49] actually engaged in same.

(c) *The Company's Defense Based on the Union's Telegraphic Application for Reinstatement*

The Company argues that, issues of striker misconduct aside, none of the strikers was entitled to reinstatement because the Union's December 9 telegram was not an unconditional application for same in that it stated that employees would return to work "on their regularly assigned shifts." The Company analogizes this to the union's telegram in *H. & F. Binch Co.*,[50] stating that all striking employees will return to work "provided you agree to take

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47. *Carlson Roofing Co., Inc.*, 245 NLRB No. 4 (1979).

48. *N.L.R.B. v. Clinton Packing Co., Inc.*, 468 F.2d 953, 81 LRRM 2733 (8th Cir., 1972), enf'g. as mod. 191 NLRB 879 (1971).

49. Kenneth V. Palmer, Phillip J. Faulkner, Charles Brown, James Kelly, Jerry Kirbo, John Ward, Mary Burth, Robert Barry McCoy, Anthony Crouch, Eulice Favors, Cecil Barber, Carlene Frost, Yvonne Blalock, James O'Neal, Joseph M. Williams, Robin O. Boudrie, Michael W. Buttram, Robert L. Russell, Donald Ray Thrash, Stephen C. Smith.

50. *H. & F. Binch Co.*, 188 NLRB 720 (1971), enf. as mod. 456 F.2d 357, 79 LRRM 2692 (2d Cir., 1972).

everyone back without discrimination."[51] and apparently contends that *Binch* is authority for its argument that the telegram herein was not an unconditional application.

This argument lacks merit if only because the chronology in *Binch* is the reverse of the one in the instant case. In *Binch*, a group of permanently replaced strikers first appeared at the plant and asked to return. "By thus offering themselves for work," the Board held, "these replaced strikers made it clear that they were seeking reinstatement." They had "made an unconditional offer to return to work by virtue of their appearance for work. . . ."[52] Later, however, the union sent the telegram quoted above, and the Board held that this nullified the unconditional character of the strikers' offer to return.

In the instant case, the Union first sent the telegram, on December 9, stating that the employees would return on December 10 to "their regularly assigned shifts." The employees *thereafter* presented themselves on December 10, and, as the record shows, accepted work on the second shift, since their former jobs on the first shift had been filled by permanent replacements. The Company, however, singled out those employees charged with misconduct, and told them that there was "no work" for them, or that their status was being investigated, or determined.

The Company had no reason to believe that these employees would not have accepted second shift jobs as the other strikers were doing, the Union's telegram notwithstanding. The matter was never put to a test, and, instead, these strikers were suspended. I find that all the strikers, by their appearance at the plant on December 10, and by their demonstrated willingness to accept jobs on shifts

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51. *Ibid.*, 188 NLRB at 724.

52. *Ibid.*

other than their former shifts, cured whatever defect there may have been in the Union's telegram, and thereby made an unconditional application for reinstatement.

The technicalities of the reinstatement application are not relevant to the Company's further action in discharging employees on December 20 for alleged misconduct. It would have been futile for the alleged discriminatees to have made applications for reinstatement thereafter, in light of the Company's charges. Accordingly, those strikers who were discharged without good cause were entitled to reinstatement without having made any further application for same.[53]

(d) *Legal Conclusions on Strikers Erroneously Charged with Misconduct*

I conclude that the Company, by suspending on December 10, 1979, and discharging on December 20, those strikers charged with misconduct who had not actually engaged in same,[54] at a time when they were engaged in protected activity, thereby violated Section 8(a)(1) of the Act.[55]

(e) *Clarence Watson and Wiley Shepherd*

As economic strikers who had been permanently replaced, Watson and Shepherd were still "employees,"[56] and under existing law were entitled to remain on a preferential hiring list until substantially equivalent jobs became

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53. *Sigma Service Corporation*, 230 NLRB 316 (1977).

54. See fn. 49, *supra*.

55. *N.L.R.B. v. Burnup & Sims, Inc.; Roadway Express, Inc.*, *supra*, fn. 39.

56. See authority discussed in *Little Rock Airmotive, Inc. v. N.L.R.B.*, 455 F.2d 163, 79 LRRM 2544 (8th Cir., 1972), enf. as mod. 182 NLRB 666 (1970).

available. By discharging them for refusing to accept something less than full reinstatement, the Company deprived them of continued placement on this list.

It is very well to argue, as does the Company, that Watson and Shepherd suffered no damages because no such jobs became available until February 1980. On the present record there is no way of disproving this. On the other hand, the only way of establishing the existence of such jobs prior to February 1980, and of Watson's and Shepherd's entitlement to them, would have been their continued presence on the hiring list. The Company could hardly have been expected to seek out employees whom it had discharged, nor is it likely that they were retained on the list. By evicting them from this preferred position, the Company effectively denied them any opportunity to establish the earlier existence of the same or equivalent jobs.

Over and above the rights of Watson and Shepherd, it would have a chilling effect on the right of employees to strike over economic matters if the employer, having hired permanent replacements during the strike, and upon the strikers' application for reinstatement, could compel them to accept lesser jobs or forfeit employee status. I conclude that by discharging Watson and Shepherd for refusing to accept lesser jobs, the Company thereby interfered with their Section 7 rights in violation of Section 8(a)(1) of the Act.

(f) *Denial of Vacation Benefits to Carlene Frost and Mary Burth*

The Board has held with judicial approval that where an employer conditioned payment of accrued vacation benefits to employees on their cessation of an economic

strike, and failed to submit adequate business justification for its conduct, a violation of Section 8(a)(3) of the Act was established without specific proof of unlawful motive.[57] The Board interpreted the Supreme Court's ruling in *Great Dane Trailers*,[58] distinguishing between "inherently destructive" and "comparatively slight" discrimination, and found the conduct to be violative of the Act because the Company submitted no justification. In its enforcing decree, the Court of Appeals for the District of Columbia Circuit found it unnecessary "to tread the uneasy path between 'inherently destructive' and 'comparatively slight' discrimination," since the Company failed to prove a substantial business justification for its conduct.[59] Even if the respondent's position on discrimination had been accepted, the facts were sufficient to establish a violation of Section 8(a)(1).[60]

In the instant case, the Company offered no sufficient reason for its refusal to pay Frost and Burth their accrued vacation pay. In accordance with the Board's reasoning in *Cavalier*, I find that by denying Frost and Burth their accrued vacation pay, without adequate business justification, the Company violated Section 8(a)(3) and (1) of the Act.[61]

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57. *Cavalier Division of Seeburg Corp.*, 192 NLRB 290 (1971), enf. as mod., *sub nom Allied Industrial Workers, AFL-CIO, Local Union No. 289 v. N.L.R.B.*, 476 F.2d 868, 82 LRRM 2225 (DC Cir., 1973).

58. *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

59. *Allied Industrial Workers, supra*, fn. 57, 82 LRRM at 2231.

60. *Ibid.*, 82 LRRM at 2231, fn. 18.

61. I make no finding on the Company's motivation, as none is required under Board's rationale in *Cavalier, supra*, fn. 57.

(g) *Terri Bowden Fuller*

The evidence shows that, although Fuller was a striker and was known as such by the Company, she was also a probationary employee with a record of unacceptable absenteeism. The Company had a practice of discharging other probationary employees for similar infractions. Because of the minimal evidence of anti-union animus by the Company, the fact that Fuller was absent as charged, and the fact that the Company was following its customary practice in dealing with probationary employees, I conclude that the Company did not violate the Act by its discharge of Fuller.[62]

The refusal of the Company to process a Union grievance over the Fuller discharge was not violative of the Act, because the contract gave Fuller, a probationary employee, no right to such proceeding, and the grievance was not presented in conformity with the contract terms. However, McCollum did violate Section 8(a)(1) when he told Union steward Prather in December 1979, during a discussion of the Fuller discharge, that there was no formal grievance procedure. This was similar to his unlawful statements to returning employees in February 1980, discussed above.

D. *Supplemental Legal Analysis of Alleged Section 8(a)(5) Violation and Conclusions of Law*

As described above, ruling was reserved on the General Counsel's argument that the Company violated Section 8(a)(5) by its demand that the Union agree to the discharge of strikers accused of misconduct. As I have just determined, some of those discharges were unlawful—of

62. *Federal Pacific Electric Co.*, 195 NLRB 609 (1972).

employees whose names appeared on the "discharge" list given by Broughton Kelly to Henson on December 3.

It is true that *Nordstrom*[63] involved discharges violative of Section 8(a)(3), whereas the discharges here in issue violate Section 8(a)(1), and it is also true that the Board in *Olin*[64] speaks of an employer's right to discharge employees so long as his motive is not "discriminatory."[65] However, the discharges herein were also contrary to the principles of the Act for the reasons set forth in *Burnup and Sims*,[66] and tended to "frustrate the bargaining process"[67] as did the union's demand for reinstatement in *Olin*. I therefore conclude that the Company additionally violated Section 8(a)(5) by demanding to impasse the Union's agreement to a nonmandatory subject of bargaining, to wit, the discharge of employees who had not engaged in misconduct warranting such discipline.

In accordance with my findings above, and upon consideration of the entire record, I make the following:

Conclusions of Law

1. Georgia Kraft Company, Woodcraft Division, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Laborers' Local Union No. 246 is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the the following conduct, the Company committed unfair labor practices in violation of Section 8(a)(1) of the Act:

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63. *Nordstrom, Inc., supra*, fn. 8.

64. *Olin Corporation, supra*, fn. 9.

65. *Supra*, fn. 10.

66. *N.L.R.B. v. Burnup & Sims, Inc., supra*, fn. 39.

67. *Supra*, fn. 10.

(a) Telling employees that there was no formal grievance procedure, where such employees had been subject to a recently expired collective-bargaining agreement which contained such procedure.

(b) Discharging strikers Clarence Watson and Wiley Shepherd on December 20, 1979, for refusal to accept jobs which were not substantially equivalent to their former jobs.

(c) Suspending on December 10, 1979, and discharging on December 20, 1979, the following-named employees for engaging in alleged strike misconduct warranting such discipline, when in fact the employees had not engaged in same:

Kenneth V. Palmer	Cecil Barber
James Kelly	James O'Neal
Mary Burth	Michael W. Buttram
Eulice Favors	Stephen C. Smith
Yvonne Blalock	Charles Brown
Robin O. Boudrie	John Ward
Donald Ray Thrash	Anthony Crouch
Phillip J. Faulkner	Carlene Frost
Jerry Kirbo	Joseph M. Williams
Robery Barry McCoy	Robert L. Russell

4. By failing and refusing to pay accrued vacation pay to Carlene Frost and Mary Burth, without adequate business justification for such refusal, the Company violated Section 8(a)(3) and (1) of the Act.

5. By insisting to impasse that the Union agree (a) to withdraw charges previously filed with the National Labor Relations Board and the courts, and (b) to the discharge of employees for alleged misconduct in which they

had not in fact engaged, the Company thereby insisted on non-mandatory subjects of bargaining in violation of Section 8(a)(5) and (1) of the Act.

6. The Company has not engaged in any other unfair labor practices.

IV. The Remedy

It having been found that the Company has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that the Company violated Section 8(a)(1) of the Act by the suspension and/or discharge of the employees named in Conclusions of Law 3(b) and 3(c), the Company shall be ordered to make them whole for any loss of pay or other benefits they may have suffered as a result of their unlawful suspensions and/or discharges.

As for the employees listed in Conclusions of Law 3(c), who were discharged for alleged misconduct, but who were returned to work in February 1980, the Company shall be ordered to pay them backpay with interest[68] from the time of their disciplinary suspensions on December 10, 1979, until the time of their return to employment in February 1980,[69] and to credit their employment records for the same period with working time for vacation and seniority purposes.

The Company shall also be ordered to credit for such purposes the employment records of Clarence Watson and

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68. See *Florida Steel Corporation*, 231 NLRB 651 (1977), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

69. *Roadway Express, Inc.*, *supra*, fn. 39 (sl. op., p. 8, fn. 7).

Wiley Shepherd from December 20, 1979, the date of their unlawful discharges, until the dates of their return to employment. In addition, the Company shall be ordered to reconstruct, on a daily basis, its personnel records since the time of their discharges, for the purpose of establishing whether any substantially equivalent job became available for either of them prior to the time when he returned to employment with the Company. In the event that such reconstruction of personnel records establishes that there was such prior job, and that the Company would have hired Watson or Shepherd, in the order and according to the method which it was then utilizing, had such employee been on a preferential hiring list, then the Company shall be ordered to make such employee whole by paying him backpay from the date of availability of such job to the date he returned to employment with the Company, with interest.[70]

It having been found that the Company unlawfully failed and refused to pay Carlene Frost and Mary Burth accrued vacation pay in violation of Section 8(a)(3) and (1) of the Act, the Company shall be ordered to pay said vacation pay to them, with interest from the date that such vacation pay would normally have been paid.[71]

It having been found that the Company has refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act, it shall be ordered to cease and desist therefrom, and, upon request, bargain with the Union.

Upon the foregoing findings of fact, conclusions of law, and the entire record, I recommend the following:

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70. *Supra*, fn. 68.

71. *Ibid.*

ORDER[72]

Georgia Kraft Company, Woodcraft Division, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Telling its employees that there is no grievance procedure.

(b) Suspending, discharging, or otherwise disciplining employees for alleged misconduct in which they have not engaged.

(c) Discharging employees for refusal to accept jobs which are not substantially equivalent to their former jobs.

(d) Failing and refusing to pay accrued vacation pay to employees who are entitled to same; or

(e) Refusing to bargain in good faith with Laborers' Local Union No. 246.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Pay each of the following listed employees backpay from December 10, 1979, until such time as he or she returned to employment with the Company, in the manner set forth in the section of this Decision entitled "The Remedy," and credit the employment record of each such employee, for such period, with working time for seniority and vacation purposes:

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72. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Kenneth V. Palmer	Cecil Barber
James Kelly	James O'Neal
Mary Burth	Michael W. Buttram
Eulice Favors	Stephen C. Smith
Yvonne Blalock	Charles Brown
Robin O. Boudrie	John Ward
Donald Ray Thrash	Anthony Crouch
Phillip J. Faulkner	Carlene Frost
Jerry Kirbo	Joseph M. Williams
Robert Barry McCoy	Robert L. Russell

(b) Credit the employment records of Clarence Watson and Wiley Shepherd with working time from December 20, 1979, until such time as each of them returned to employment with the Company, for seniority and vacation purposes.

Prepare and submit to the Regional Director for Region 10 a reconstructed daily record of available jobs and names of incumbents holding such positions, including the date of their hire, and vacancies, if any, for the same period indicated above.

In the event that such reconstructed record shows that the same job held by Watson or Shepherd, or a substantially equivalent one, became available prior to the time such employee was rehired, make him whole for any loss of pay he may have suffered by reason of the Company's unlawful discharge of him, in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(c) Make whole Carlene Frost and Mary Burth by paying each of them two weeks' vacation pay for 1979, to the extent that they have not already received same,

with interest as set forth in the section of this Decision entitled "The Remedy."

(d) Upon request, bargain with Laborers' Local Union No. 246, and, if agreement is reached, embody same in a written agreement.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the extent of the Company's actions required to comply with this Order, and the amount of backpay due.

(f) Post at its plant at Greenville, Georgia copies of the attached notice marked "Appendix."[73] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by the Company's representative, shall be posted by it, immediately upon receipt thereof, for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps the Company has taken to comply therewith.

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73. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS ORDERED that the complaints be dismissed insofar as they allege violations of the Act not specifically found.

Dated at Washington, D.C. December 18, 1980.

/s/ Howard I. Grossman
Howard I. Grossman
Administrative Law Judge

EXCERPTS FROM ADMINISTRATIVE HEARING TRANSCRIPT

[715] Whereupon,

WILLIAM ALAN WALKER

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE GROSSMAN: Please, be seated.

THE WITNESS: (Complying.)

MR. RHAUDABAUGH: Mr. Walker, I'm going to ask you several questions and if at any time you do not understand the question or you do not hear me ask the question clearly or, for that matter, I'm sure the same goes for Counsel for General Counsel, this gentleman seated here to my left, please ask us to repeat the question.

DIRECT EXAMINATION

BY MR. RHAUDABAUGH:

Q. Would you state your full name and address for the record? A. William Alan Walker, 126 Flat Shoals Road, Woodbury, Georgia.

Q. Are you—With whom are you employed? A. Woodkraft.

Q. And, where are you employed? A. It is located in Greenville.

Q. How long have you been employed at this plant? A. September will be a year.

[716] Q. Were you employed during the Fall of 1979? A. Yes, sir.

Q. Do you recall that a strike took place? A. Yes, sir.

Q. Do you recall, approximately, the duration of the strike? When it began and when it ended? A. I believe it was the 15th of November. I think it was over on the ninth or 10th of December.

Q. Do you recall any particular events that occurred during the strike with which you became involved? A. Yes, sir. I had two Union employees visit my home.

Q. Could you tell us, approximately, the time of day and, approximately, the date? A. I believe it was Tuesday—the Tuesday after Thanksgiving.

Q. And, approximately, what time of day was it, if you recall? A. It was 7:15—around 7:15 in the evening.

Q. And, before we go on, do you recall—Can you identify the persons who visited you? A. Yes, sir. One is Landis Bishop and Jeff Hughes.

Q. Did these individuals work at the plant? A. Yes, sir, they did.

Q. Will you tell us what happened once they came to your house? [717] A. (No response.)

Q. What—what happened? A. They come to my door and I asked them what they wanted and they said they wanted to talk to me and I asked them in reference to what and they said about me returning to work, why did I return to work, why was I not on the picket lines, that I was Union member and that my name was called and that I was not there, that I could be fined by the Union and also

fired from my job because of it—because I wasn't attending the meetings or anything.

Q. Did you have anything to say? A. Yeah. I told them that I needed the money and that I had tried to go along with the strike, but I was not a Union member and they told me that I was. When I had returned to work, crossing the picket line, I had found out that—Landis Bishop had told me the day of the strike, earlier that day, that—that I was a member and that my probationary period was up. I found out when I returned to work during the strike that it was not up and that I had a couple of more days to go and from him telling me that, I asked Personnel—the Personnel lady, Ms. Gregory, to throw my card away; that I did not want to join the Union.

Q. Now, you say they came—they came to your house and they said that you could be fined and something to the effect that you should be on the picket line. [718] A. Right.

Q. Is that all they said? A. No, that's not all they said. They were sloppy drunk. They reaped of liquor. I could—I smelled it when I immediately opened the door and I didn't want to talk to them to begin with. They were not asked to come to my house and I asked them to leave when I first opened the door, that I did not want to talk with them; and, they were laughing and saying, well, they just wanted to talk. Well, I said, all right; you know, they started talking.

And, they was telling me I was taking their God damn money away from them; screwing them out of their God damn money is what they said, in effect, and Landis Bishop said this and Jeff Hughes was backing him up and repeating what he said. I immediately asked them not to cuss because my little girl was in the room with me and my wife was there. My wife was pregnant at that time and I had

her take my little girl and leave the room, but my little girl come back in the room and my wife stayed in the kitchen because she was pregnant and I did not want her upset.

They was standing in there and they was—Let's see, it was Landis Bishop. Bishop told me that if I returned to work that he would take care of me and I asked him what he meant by that and he started laughing and Jeff said, "yeah, we'll take care of you." I asked them—I said, "what do you [719] mean by that?" I repeatedly was asking him and he was talking about that I shouldn't have been crossing the picket line and Jeff Hughes called me a "sorry mother fucker" for taking their money away from them. My little girl was standing right beside me. I couldn't leave them and try to get her out of the room.

This continued and I continued to ask for them not to cuss and I kept asking them to leave when they started cussing, but they refused to do that.

Q. Did they eventually leave? A. Yes, they did.

MR. RHAUDABAUGH: I have no further questions at this time.

JUDGE GROSSMAN: Cross-examination?

CROSS-EXAMINATION

BY MR. LEVY:

Q. When you came to the door, Mr. Walker, and these two men were there, you said that you opened the door, but there was a screen there, was it not? A. Yes, sir.

Q. The screen door was locked while you were speaking with these men, was it not? A. Yes, sir.

Q. Did they try to forcibly come in? [720] A. No, sir, they didn't.

Q. When you asked them to leave, did they? A. No, they didn't.

Q. What did you do? A. I asked them to leave and I started to shut the door, but they kept on talking. So, I was, you know, trying to be considerate and listen to what they said in hopes that they would leave.

Q. You were trying to be considerate despite the fact that, according to your testimony, they were using language that you didn't feel was appropriate; your small daughter was there and you didn't want her to hear it; your pregnant wife was not to be upset. A. I had a glass front door. There is no way that I could have prevented them, my shutting the door. They could have come in my home if they wanted to.

Q. I understand that, sir; but, what I was asking you, you asked them to leave and when you start to shut the door—I think you told us—they are using language that you did not approve of and you told us why and, yet, as a matter of courtesy to them, you're going to continue standing there to speak with them. Is that your testimony? A. In a sense, yes.

MR. LEVY: I have no further questions.

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[1126] MR. LEVY: May we be off the record briefly while we arrange for Mr. Landis Bishop to be our next witness?

JUDGE GROSSMAN: Off the record.

(Off the record.)

JUDGE GROSSMAN: On the record.

Whereupon,

LANDIS R. BISHOP

having been first duly sworn, was called as a Witness herein and was examined and testified as follows:

DIRECT REBUTTAL EXAMINATION

BY MR. LEVY:

Q. May we have your name, please, sir, and your address? A. Landis Ray Bishop, Route 1, Box 63, Luthersville, Georgia.

Q. Mr. Bishop, have you ever worked for Georgia Kraft over in Greenville? A. Yes, I have.

Q. Before the strike, how long did you work for them? A. Approximately 18 months.

Q. Mr. Bishop, I want to direct your attention to any occasion that you may have had to speak to an employee or employees who were working during the course of the strike. Did that ever happen? A. Yes, sir, it did.

[1127] Q. Do you ever remember speaking with anybody by the name of William Walker? A. Yes, sir.

Q. Do you remember when that was, sir? A. I don't remember an exact date; no, sir, sometime shortly after the strike started.

Q. Do you remember where you spoke with Mr. William Walker? A. Mr. Walker's home.

Q. And was anyone with you on that occasion, other than just yourself? A. Mr. Jeff Hughes.

Q. Do you recall about what time of day this was? A. Approximately 7:15 to 7:30 p.m.

Q. And what reason, if any, can you give us for you and Mr. Hughes to go and see Mr. Walker? A. Well, the only reason Mr. Hughes was there with me was because he knew where Mr. Walker lived, and I didn't. He carried me down there, and—

Q. Why did you want to go see Mr. Walker? Why were you there? A. I wanted to talk to him about why he had gone back to work.

Q. As far as you were concerned, what business was it of yours? [1128] A. Because before the strike, I was a Union Steward, and Mr. Walker had questioned me on several different occasions before the strike about when his probationary period would be up so he could join the Union.

Q. Well, what did that have to do with your seeing Mr. Walker? A. I wanted to find out why he had gone back to work after he had joined the Union.

Q. As best you can remember or recall for us, will you tell us what you had to say, what Mr. Hughes had to say, what Mr. Walker had to say on this occasion, about 7, 7:15, whenever it was in the evening? A. Well, we went to Mr. Walker's home in Woodbury, went up on the front porch, and I knocked on the door. He came to the door and saw who it was. He asked me how I was doing. I asked him how he was doing, back and forth, you know.

And I asked him why he had gone back to work, and he told me he needed the money. I told him that he didn't need the money any more than anybody else did, you know, and he explained to me about his wife being pregnant and that he had just bought his house and everything. And I told him that he didn't need it—He wasn't in any worse shape than I was, that I just had built a new house and moved into it, just about six months prior to that.

Q. Did Mr. Walker have anything further to say? Did you [1129] have anything further to say? Did Mr. Hughes have anything to say? A. I asked him why he had gone back to work, and, like I said, he said he wanted the money; he needed the money, you know.

And I explained to him, by him going back to work while we were all out on strike, that it would be affecting a lot more people than just him.

And Mr. Hughes told him that he was messing with a lot of peoples' money, lot of other peoples' money. I told him I was down there to find out—I thought maybe the Company had bribed him to go back to work, or what have you, because we had heard rumors of that going on, and I wanted to find out if there was anything to it.

Q. Did Mr. Walker respond? Did you have anything further to say? Did Mr. Hughes have anything further to say? A. Mr. Walker didn't make a comment on anything of the Company having anything to do with it. He didn't mention a bribe. He didn't make any comment at all on that.

Q. Please continue. What else happened and was said? A. After he said that, he asked me did we come down there to threaten him.

Q. Did you answer him? A. I said, "No, William, there's nobody down here to threaten you. I just want to find out what's going on." And [1130] Mr. Hughes didn't make any remarks on that.

And when Mr. Hughes said something about—prior to that, when we was talking about the money, and Jeff told him he was messing with—I believe he said he was messing with a lot of other peoples' damn money, Mr. Walker said something about his wife or his daughter or somebody, his kids or something,—I don't know his exact words.—might hear him.

Mr. Hughes apologized to him for saying damn, and that was about the extent of Mr. Hughes' conversation.

Q. Did you and Mr. Walker continue the conversation after that? A. Well, after he had asked me did we come down there to threaten him, he told me that if

anything happened to his property, his home, any of his family, that there would be a law suit.

And I told him, I said, "Well, you know, didn't nobody come down here to threaten you. I ain't threatening you. I ain't going to bother your family or nothing else, but if you feel like you have to get a law suit, you just do what you've got to do", you know.

Q. Did Mr. Walker have anything else to say? Did you have anything else to say? Did Mr. Hughes have anything else to say, as best you can remember? A. Mr. Walker told me he thought it was time we left his [1131] property. So, I told him okay, and Mr. Hughes had already walked off of the porch and started down the sidewalk, and I told him okay, and I started down—started off of the steps.

At this time—I hadn't said anything else. I told him that if he went on back to work, he may be doing it at his own risk, that I wasn't going to hurt him, and Jeff wasn't going to hurt him, but I didn't know what the other people might do.

Q. All right. Anything else, sir? A. And with that, Mr. Walker unlocked his door and about halfway stepped around his door, you know, put one foot out on the porch, one foot still in his doorway, and said, "I want y'all to get off my property."

Mr. Hughes was already in the truck by then, and I was standing on the sidewalk. I told him, I said, "Now, William, this sidewalk belongs to the City of Woodbury. If you want me moved off of the sidewalk, you're going to have to move me."

And that was it. We left then.

Q. All right. A Nothing else was said.

Q. Now, before you and Mr. Hughes arrived to speak with Mr. Walker, would you describe what you had been doing? A. We had been at a Union meeting right there

at the plant [1132] site, right there at Georgia Kraft where we had the tent set up outside the railroad.

Q. Did you have anything to drink that evening, as best you can remember, before you spoke to Mr. Walker? A. I hadn't had a drop; no sir.

Q. What about Mr. Hughes? A. Mr. Hughes, in my presence, had drunk about a half a beer, about half of one Miller Beer, because he had it—He had left it in the truck while the Union meeting was going on, and he finished drinking that going towards Woodbury.

Q. Were you weaving back and forth at the time when you were speaking with Mr. Walker? A. I don't know of no reason why I would have been. I mean, I was as sober as I am right now.

Q. But were you weaving? A. No, sir.

Q. What about Mr. Hughes? Was he? A. Not to my recollection, he wasn't.

Q. Did either you or Mr. Hughes have any problem navigating the steps, where you kind of tripped or stumbled or something like that, either going up to his house or leaving his house? A. No, sir.

Q. Other than the word "damn", do you remember any other words that we might call as curse words being used, either by [1133] Mr. Walker, yourself, or Mr. Hughes? A. No, sir, I don't.

Q. While you are speaking with Mr. Walker, is his door opened or closed? A. His main door there had a big plate glass window in it, and it was open, but his screen door was closed and locked.

Q. Did it stay that way except for the time when you have told us that he opened it and put one foot outside of it, while you are speaking with him? A. Yes, sir, it did.

MR. LEVY: I pass the Witness.

JUDGE GROSSMAN: Cross-examination?

MR. RAUDABAUGH: May we have the statement?

MR. LEVY: Four pages. (Presenting document to Mr. Raudabaugh.)

JUDGE GROSSMAN: Two minutes, did you say?

MR. RAUDABAUGH: A few minutes to read four pages.

JUDGE GROSSMAN: Off the record.

(Off the record.)

JUDGE GROSSMAN: On the record.

(Filed November 14, 1983)

SUPREME COURT OF THE UNITED STATES

No. 83-103

Woodkraft Division, Georgia Kraft Company,
Petitioner,
vs.
National Labor Relations Board

ORDER ALLOWING CERTIORARI.

Filed November 14, 1983.

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Eleventh* Circuit is granted, limited to Question 1 presented by the petition.

CERTIFICATE OF SERVICE

I, J. Roy Weathersby, do hereby certify that I have this day served the within and foregoing Joint Appendix by mailing three copies thereof in envelopes properly stamped and addressed as follows:

Rex E. Lee, Esquire
Solicitor General
Department of Justice - Suite 5614
9th & Constitution Avenue, N.W.
Washington, D.C. 20530

William A. Lubbers, Esq.
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Suite 1200
Washington, D.C. 20570

This ..... day of December, 1983.

J. Roy WEATHERSBY